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No. 97-1704

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# In the Supreme Court of the United States

OCTOBER TERM, 1997

ESTEBAN ORTIZ, ET AL.,
*Petitioners*

*v.*

FIBREBOARD CORPORATION, ET AL.,
*Respondents*

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

## BRIEF FOR PETITIONERS

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63 pp

## QUESTIONS PRESENTED

1. May the Fed.R.Civ.P. 23(a) requirements of commonality and typicality be met in a Rule 23(b)(1)(B) class action, despite this Court's holdings in *Amchem Products v. Windsor*, by reference to a proposed settlement when the claims alleged in the complaint share no common or typical questions of law or fact, and may such a class be certified under Rule 23(a)(4) despite the existence of structural conflicts of interest—including a conflict between presently injured and future claimants, the same conflict condemned by this Court in *Amchem*?

2. Despite the Rules Enabling Act, the Rules of Decision Act, the teachings of *Amchem* and principles of federalism, may a federal court certify a class action under Rule 23(b)(1)(B), premised upon a "limited fund" contrived by a settlement between the parties, to circumvent the Bankruptcy Code and to alter the substantive state law rights of absent class members?

3. Does the Due Process Clause:

(a) permit a federal court to bind absent class members (including residents of the state where the action is brought) to a class action judgment that alters their *in personam* claims for money damages without giving them a chance to opt out of the class?

(b) permit a federal court sitting in diversity to exercise personal jurisdiction over class members asserting *in personam* claims for damages without giving them a chance to opt out, when those class members lack minimum contacts with the forum state?

4. Can class notice sufficient under the Due Process Clause and Rule 23(e) ever be given to a class that includes unknowing, unidentifiable potential future asbestos victims who have no perceptible injury at the time of the class settlement and notice?

5. Does a federal court have power under Article III to adjudicate a "case" brought by plaintiffs who do not in good faith plead claims they intend to litigate, but who bring suit as a friendly joint venture with the defendants solely to provide a jurisdictional hook on which a federal court agrees to hang a tort reform proposal displacing the laws of 50 states?

## PARTIES TO THE PROCEEDING

The petitioners in this case are Esteban Yanez Ortiz, Edee Cochran, Lester E. Taylor, John Allgood and Henry Evers. The defendant is Fibreboard Corporation. The plaintiff class representatives are Gerald Ahearn, James Dennis, Charles W. Jeep, James Ellison, and William Mitchell. The insurers who intervened below are Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, and Pacific Indemnity Company. The other parties below were Roland Dearborn; Judith Dearborn; Kerwin Butcher, Director, Office of Workers' Compensation Programs, U.S. Department of Labor; James Flanagan; David Middleton; Owens-Illinois, Inc.; Bethlehem Steel Corporation; Kenneth Smith; Plant Insulation Company; and Safety National Casualty Corporation.

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## OPINIONS BELOW

The opinion of the court of appeals after remand (Cert. Appendix 1a)[1] is reported at 134 F.3d 668. The order of this Court vacating the original judgment of the court of appeals (CA 36a) is reported at 117 S.Ct. 2503. The original opinion of the court of appeals (CA 37a) is reported at 90 F.3d 963. Its opinion denying rehearing en banc (CA 546a) is reported at 101 F.3d 368. The district court's opinion approving the class settlement (CA 183a) is reported at 162 F.R.D. 505; its findings of fact (CA 243a) and conclusions of law (CA 469a) are not reported.

## JURISDICTION

The judgment below was entered on January 27, 1998. CA 3a. This Court has jurisdiction under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Pertinent portions of Article III of the U.S. Constitution, the Due Process Clause of the Fifth Amendment, the Rules Enabling Act, 28 U.S.C. § 2072, the Rules of Decision Act, 28 U.S.C. § 1652, and Fed.R.Civ.P. 23 are set forth at CA 550a-51a.

## STATEMENT OF THE CASE

The court below held that a nationwide, future-claimant, settlement-only, mandatory class action may be employed to alter the substantive state-law rights of absent class members if the settling parties negotiate what the court called a "limited fund"—a fund limited only by what the defendant, solvent but claiming a risk of future insolvency, and the defendant's insurers, are willing to pay now to resolve its entire future stream of tort liabilities.

**1. Background and Settlement Negotiations.** This is a mass tort class action involving asbestos personal injury claims against Fibreboard, but it didn't start out that way. It arose out of an entirely separate insurance coverage dispute in a California state court

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[1] Citations to the appendices to the Petition for Certiorari will be styled "CA __a"; to the Joint Appendix, "JA__"; and to Class Counsels', Fibreboard's, and the Insurers' Briefs in Opposition, "Class BIO", "Fibre.BIO", and "Ins.BIO" respectively.

between Fibreboard, which had manufactured asbestos-containing products for fifty years (CA 38a), and Continental Casualty Co. ("Continental") and Pacific Indemnity ("Pacific")("the Insurers"). Continental and Pacific had written insurance policies for 1956 - 1959 with "no aggregate limit" on asbestos-related liability (CA 267a)—thus providing an *unlimited* insurance fund for claims covered by those policies.[2] Although the Insurers disputed coverage for Fibreboard's liabilities, in a series of rulings from 1985 to 1990 the California trial court rejected all of the Insurers' defenses. CA 268a-69a. After the class action settlement in this case was negotiated and approved by the district court, the California appellate courts finally resolved most of the contested coverage issues in Fibreboard's favor. CA 271a.[3]

Presented with this prospect of virtually unlimited insurance coverage under the disputed policies, Fibreboard established a "corporate goal" of protecting its shareholders' equity by "resolv[ing] its asbestos liabilities within its available insurance resources." CA 577a. To this end, in 1991 Fibreboard solicited several nationally prominent asbestos plaintiffs' attorneys (hereafter, "Class Counsel")[4] to negotiate a "global" solution to all of

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[2] Thus, while Fibreboard by 1988 had exhausted its insurance against claims by those first exposed to asbestos after 1959, other claimants potentially could draw upon an insurance fund that was uncapped and in no sense "limited." Due to this lack of insurance for post-1959 claims, after 1988 Fibreboard settled such cases for considerably less than pre-1959 claims. CA 148a-49a (Smith, J., dissenting).

[3] *See Armstrong World Indus. v. Aetna Cas. & Sur. Co.*, 45 Cal.App. 4th 1, 52 Cal.Rptr. 2d 690 (Cal.Ct.App. 1996), *review denied* (Aug. 21, 1996). Before that judgment became final, the Fifth Circuit effectively mooted the coverage litigation with respect to Fibreboard, Continental and Pacific by approval of the "Trilateral Settlement Agreement" in the case of *Continental Casualty Co. v. Rudd*. CA 93a-98a. As described below, the Trilateral Agreement compromises Fibreboard's coverage dispute independent of the class settlement in this case. The California coverage case continued despite this class settlement because it involved a number of other asbestos defendants and insurers.

[4] Harry Wartnick, Steven Kazan, Joseph Rice, and Ron Motley. Joseph Cox, a partner of Messrs. Rice and Motley at the Ness, Motley firm, later took Mr. Motley's place. The Ness, Motley firm also served as class counsel in the *Amchem* case. The four plaintiffs' attorneys retained Elihu Inselbuch of Caplin & Drysdale to represent them. CA 200a.



Fibreboard's asbestos liabilities for all time. Global negotiations did not go well, but in 1992 Fibreboard settled 20,000 existing claims with Class Counsel without paying any of its own money, by assigning to the plaintiffs Fibreboard's rights under its Continental insurance policy. CA 42a. Class Counsel and Fibreboard also discussed using this same device to settle all future asbestos claims. Fibreboard then brought suit in the Eastern District of Texas seeking a ruling that these assignments to Ness, Motley's individual clients did not violate the Continental policy, which is how the *dramatis personae* in this case came before Judge Robert Parker, then Chief Judge of the Eastern District of Texas. CA 42a.

Continental did not take to the idea of Fibreboard assigning benefits under its liability policies without its involvement, so in March 1993, Continental began participating in these global negotiations. CA 42a-43a. Thus the negotiations between Class Counsel and Fibreboard to resolve asbestos claims expanded to become negotiations among those parties and Continental to resolve both its coverage dispute and Fibreboard's total asbestos liabilities. In August 1993, Pacific joined the negotiations.

While negotiating this global settlement, Class Counsel settled their entire outstanding inventory of about 45,000 existing asbestos claims in a separate side deal which paid "a higher-than-average value per claim," for a total of approximately $470 million, with half of the payment "contingent on the outcome of the [insurance] coverage case or on the existence of a settlement." CA 45a n. 3; JA 119a.

On August 9, 1993, Judge Parker issued an order directing Class Counsel to "negotiate [with Fibreboard] the prospect of a Rule 23(b)(1)(B) settlement class composed of future plaintiffs with claims against Fibreboard." CA 45a; JA 289a-290a. Thus, before a lawsuit was even filed, Judge Parker had appointed Class Counsel and had directed them to negotiate a class action settlement with the defendant on behalf of unknown "representative" plaintiffs to be named later. In the summer of 1993, Continental agreed to pay Class Counsel to file a class action against Fibreboard: 3% of any settlement would be paid to Class Counsel as attorneys' fees if

approved by the court. CA 429a. Class Counsel refused to agree to a global settlement resolving all of Fibreboard's asbestos liabilities unless Fibreboard and the Insurers first separately settled their coverage dispute; this back-up agreement ensured the availability of a large sum of money for asbestos claims if the global class action foundered in court. JA 255a; CA 46a-47a.

On August 27, 1993, Fibreboard, the Insurers and Class Counsel announced the key terms of their proposed "Global Settlement" of all future asbestos claims, which required the Insurers to pay $1.525 billion into a settlement trust (CA 46a-47a, 49a) and which ultimately yielded fees of $43.7 million for Fibreboard's hand-picked Class Counsel. CA 541a. The Global Agreement releases Fibreboard and the Insurers from all future asbestos liability and redirects future claims to the settlement trust.

Also on August 27, the Insurers and Fibreboard announced the back-up "Trilateral Agreement" in which they independently agreed to resolve their insurance coverage dispute with respect to *all* asbestos claims, both present and future, *whether or not the Global Settlement of future asbestos claims received court approval*. CA 46a-47a. The Trilateral Agreement provided that, if the Global Settlement were not approved by the courts, the Insurers would pay Fibreboard $2 billion, which Fibreboard could then use (in addition to its own assets, valued at $235 million by the district court in 1994[5]) to resolve all future asbestos claims. CA 51a.[6]

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[5] Fibreboard was acquired in 1997, subsequent to the Fifth Circuit's original decision, by Owens-Corning in a tender offer for $515 million cash, which could expand enormously the assets available to pay Fibreboard's future asbestos liabilities. CA 10a n.11; 13a-14a (Smith, J., dissenting).

[6] To lock in the Trilateral Agreement, the Insurers filed suit against a defendant class of "future" asbestos claimants seeking a declaration that this agreement was fair and reasonable with respect to the defendant class members, who are the potential third-party beneficiaries of the liability insurance policies. *Continental Casualty Co. v. Rudd*. The defendant class in *Rudd* has essentially the same members as the plaintiff class in this case. In *Rudd*, the district court approved the Trilateral Agreement; Petitioners neither objected to that agreement nor appealed from the district court's judgment. Although the Fifth Circuit consolidated *Rudd* with this case, following issuance of the panel's decision in the two cases *Rudd* was severed. No party sought rehearing of the *Rudd* decision or review by this Court, and the *Rudd* judgment is now final.



**2. The "Class Action."** On September 9, 1993, the settling parties filed the complaint in *Ahearn v. Fibreboard Corp.*, No. 6:93cv526 (E.D. Tex. 1993), the class action "lawsuit" they had "settled" two weeks earlier. CA 552a. Invoking the court's diversity jurisdiction under 28 U.S.C. §1332 (CA 553a), the complaint alleged claims on behalf of all those who had been exposed to asbestos for which Fibreboard may be liable, but who had not filed (or had dismissed without prejudice) any asbestos-related lawsuit against Fibreboard prior to August 27, 1993. The plaintiff "class" also included anyone who ever was, *or ever would become*, a spouse, parent, child or other relative of any such exposed individual. CA 555a-56a. While the complaint sought damages for the proposed class only against Fibreboard, Continental and Pacific immediately intervened as defendants. CA 567a.

Simultaneously with filing the complaint, Class Counsel and the Insurers, pursuant to the district court's prior instructions, jointly moved for certification, under Fed.R.Civ.P. 23(b)(1)(B), of a mandatory, nationwide class of all potential future asbestos claimants against Fibreboard—including those who currently had no actionable asbestos-related condition. Future asbestos plaintiffs were thus included in the proposed class even if they had not yet sustained physical injury, had no accrued claims, and were protected by state laws from the running of statutes of limitations on any claims they might eventually develop.

No subclasses were created. For the few class members who had already developed an asbestos-related disease, the complaint sought damages for personal injuries. For all other class members—the overwhelming majority—the complaint pleaded "exposure-only" claims for increased risk of cancer, fear of cancer, and medical monitoring (CA 222a, 561a), but Class Counsel admitted under oath that, in their own words, they "certainly had no intention to file a contested or a litigated class action lawsuit against Fibreboard during this process." JA 128a. They further testified that, although they collectively had more than 50 years of asbestos litigation experience, prior to this class action none of them had ever filed *any* cases on behalf of "exposure only" asbestos plaintiffs. JA 129a; 172a-73a; 204a. Although their argument for subject matter jurisdiction and for "good faith" in pleading these exposure-only claims was predicated on the supposed availability of recovery for

such actions in California, where Fibreboard resides (CA 222a), Class Counsel testified under oath that they knew there is no cause of action in California for "risk of cancer" or "fear of cancer" "[i]n the absence of some physical injury." JA 172a.

Indeed, as both the Fifth Circuit (CA 183a) and the district court (CA 86a) recognized, those non-existent claims were pleaded in the class complaint simply to allow the district court to assert jurisdiction over the settling parties' previously negotiated agreement to resolve *future, unripe* personal injury claims over which the court concededly lacked jurisdiction. The testimony of the negotiators for each of the Respondents similarly revealed that, from the perspective of all participants, the class complaint was filed solely to allow the court to approve the settlement; none of the parties desired or anticipated an actual contested class action lawsuit on behalf of future claimants. JA 98a-99a, 292a. When asked if the purpose of this complaint and class action was "not litigation but a binding, judicially approved contract that will govern all future cases," Respondents' own ethics witness candidly replied, "[S]ure. What else are we doing here?" JA 370a.

3. **Class Counsel's Representation.** Class Counsel represented individual asbestos plaintiffs who were suing Fibreboard while concurrently negotiating a class settlement on behalf of future claimants. By defining the class to include only those who had not yet filed suit (but who may already have been injured), Class Counsel excluded their entire pre-existing client roster from a supposedly non-opt-out 23(b)(1)(B) class. CA 117a While the class negotiations were underway, Class Counsel settled their entire outstanding inventory of thousands of cases against Fibreboard for higher-than-average amounts, *contingent in part on the approval of a global settlement—on any terms—of all future claims against Fibreboard.* CA 142a-43a. Class Counsel thus had a huge "financial interest in settling the class claims on any terms whatsoever, even if those terms were unfavorable to the class." CA 142a (Smith, J., dissenting).

Moreover, conflicts of interest among certain sub-groups *within* the future claimant class rendered the representative plaintiffs *and* Class Counsel inadequate to represent the class as a whole. For example, there is a debilitating conflict between those class members who already suffer from asbestos-related disease, and those who will



not suffer such an injury until some point in the future—the very conflict that caused this Court to hold in *Amchem Products v. Windsor*, 117 S.Ct. 2231 (1997), that the class in that case had not received adequate representation. *Compare Amchem*, 117 S.Ct. at 2251, with CA 145a-48a (Smith J., dissenting) and JA 311a.[7] Finally, separate representation was also necessary inasmuch as Fibreboard was insured against the claims of pre-1959 class members but *not* the claims of those first exposed to asbestos post-1959, because prior to the settlement the claims of the former were far more valuable than those of the latter. CA 148a-150a (Smith, J., dissenting); JA 322a-324a.

4. **The Terms of the Global Class Settlement.** Although the class complaint of course alleged no unaccrued claims for future personal injuries, *the central feature of the Global Settlement is that all class members release those "claims."* The settlement provides that Continental and Pacific will contribute a total of $1.525 billion to a Trust to be established on behalf of all class members. Fibreboard will contribute a token $500,000 (out of its net worth of at least $235 million), plus $9.5 million remaining from another liability insurance policy (JA 84a), for a total fund of $1.535 billion. In return, Fibreboard is forever released from all lawsuits class members might bring in the future, and the Insurers are released from any responsibility for defending against or indemnifying such claims. CA 49a-50a.

This release of unripe future claims provides the means for Fibreboard to achieve its "corporate goal" (CA 577a) of resolving its asbestos liabilities entirely within its available insurance policies. Because the class was certified as a mandatory class under Rule 23(b)(1)(B), class members were given no opportunity to exclude themselves from this compulsory release of their as-yet unaccrued claims. The Global Settlement extinguishes class members' claims even if they received no notice of the settlement and hence were unable to object to it in a timely manner, even if they objected

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[7] Although all class members are "future" *claimants* in the sense that they had not filed or settled an asbestos-related personal injury case against Fibreboard on or before August 27, 1993, many class members have developed personal injuries since that date, and others had developed disease prior to that date but had not yet filed or settled a lawsuit.

vigorously and tried to opt out, even if they were unaware of their own exposure to asbestos or of the past exposure of whoever would someday become their parent or spouse, and even if they were not among the tiny fraction of the class that had yet suffered any injury.

In return for this forced release of all future, unaccrued claims, class members are given the opportunity, if and when they develop asbestos-related disease, to present their claims through the Alternative Dispute Resolution ("ADR") provisions of the Trust Distribution Process ("TDP"). CA 583a. Once a class member submits a claim and furnishes all necessary information to support it, the Trust will evaluate the claim and offer a settlement. CA 584a. If the class member accepts the offer, she will be paid in three annual installments—40 percent in the first fiscal year after the offer has been accepted, 30 percent in each of the following two years. CA 605a. If the class member rejects the offer, she may proceed to mediation, non-binding arbitration, and finally a mandatory settlement conference. CA 584a.

Only after enduring all of these delays may a class member finally file a lawsuit against the Trust—and, even then, the Global Settlement imposes significant limitations on that lawsuit, saddling it with what the Fifth Circuit called its "spendthrift provisions." CA 49a. Class members cannot recover punitive damages or pre- or post-judgment interest. CA 584a. They are limited to $500,000 in compensatory damages, no matter what damages are assessed by a jury. CA 607a. Even in jurisdictions where the governing substantive law provides for joint and several liability, class members are limited to the portion of liability assigned to the Trust, which stands in the shoes of Fibreboard for purposes of trial. CA 584a. The settlement penalizes any class member who ultimately prevails in court by spreading payment of the judgment in installments over five to ten years, without interest (as compared to the three-year payout for claims resolved by arbitration or settlement before resort to the judicial system). CA 605a-606a.

In contrast, the back-up Trilateral Agreement would not restrict the legal rights of asbestos victims in any way, because all it would do is resolve the coverage dispute and discharge the Insurers from further obligations under the Fibreboard policies. CA 51a. The



Trilateral would simply provide Fibreboard with $2 billion to pay future asbestos claims; plaintiffs would sue Fibreboard as usual.[8]

According to Fibreboard's representations to its shareholders in 1993 (reiterated under oath in this case), the monies in the Trilateral Agreement would be sufficient to "resolve all [of Fibreboard's future] personal injury asbestos liabilities" (JA 1014a; *see also* 40a, 122a-23a), and the Trilateral alone would allow Fibreboard to survive "indefinitely," "[p]erhaps forever." JA 42a-43a.[9]

**5. Disposition in the Courts Below.** Petitioners Esteban Yanez Ortiz, Edee Cochran, Lester E. Taylor, John Allgood, and Henry Evers are all members of the plaintiff class who intervened in the district court on June 28, 1994, for purposes of objecting to the proposed class settlement. Mr. Ortiz and Mrs. Cochran are Texas residents, while Messrs. Allgood, Evers and Taylor are Alabama citizens who argued that the district court lacked the authority to exercise personal jurisdiction over them without their consent. The district court held a hearing on the fairness of the proposed class settlement but did not conduct a separate hearing on class certification.

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[8] The Trilateral Agreement also provided approximately another $1.3 billion to pay claims that Fibreboard had already settled but had not yet paid in full, including the mass inventory settlements made with Class Counsel as side deals. JA 86a. Fibreboard's counsel testified that the Trilateral was worth about $3.35 billion in total. JA 118a.

[9] The district court found (CA 279a-80a) that, as Fibreboard itself acknowledged, Continental and Fibreboard were unable to reach a bilateral settlement of the insurance dispute in 1993 *only* because (i) Continental's offer was not high enough, and (ii) Continental wanted Pacific to contribute to any settlement. The Global Settlement was not necessary to overcome either stumbling block. Indeed, in his testimony Fibreboard's counsel expressly *denied* that it was necessary to limit or extinguish the plaintiffs' asbestos claims against Fibreboard in order to settle the insurance dispute — the problem was that the Insurers were not then willing to write "a big enough check." JA 111a. He testified that, just a month prior to reaching the Global Settlement, Fibreboard had been willing to accept a $3.2 billion coverage settlement that would not have affected plaintiffs' tort claims at all, and that would have paid Fibreboard $150 million *less* than it was subsequently guaranteed under the Trilateral Agreement. JA 118a. Thus the restrictions on plaintiffs' tort claims in the Global Settlement are, by the sworn testimony of Fibreboard's own counsel, entirely gratuitous.

On July 27, 1995, the district court reaffirmed its "preliminary" certification of the class pursuant to Rule 23(b)(1)(B). The court held that Rule 23(a)'s requirements of commonality, typicality and adequacy of representation were met because "all class members share ... common interests [in] maximizing the total settlement [and in] adopting procedures that provide for payments to claimants in an equitable manner." CA 226a-227a. The district court predicated this certification ruling on *Georgine v. Amchem Products*, 157 F.R.D. 246 (E.D.Pa. 1994) (see CA 225a, 228a), and Herbert Newberg & Alba Conte, 2 NEWBERG ON CLASS ACTIONS § 11.28 (3d ed. 1992) (see CA 223a, 225a, 226a). Both of these authorities—and the rule for which the district court cited them—were subsequently repudiated by this Court in *Amchem*. *See* 117 S.Ct. at 2247, 2249-50 & n.18. The district court then approved the settlement. CA 521a.

A divided panel of the Fifth Circuit affirmed over the vehement dissent of Circuit Judge Jerry Smith. The majority expressly refused to follow the Third Circuit's decision in *Georgine v. Amchem Products,* 83 F.3d 610 (1996), subsequently affirmed by this Court in *Amchem Products v. Windsor*, 117 S.Ct. 2231 (1997). Instead, the majority held that a settlement reduces the need to measure a class against Rule 23's requirements (CA 55a-56a) and that the "questions of law or fact common to the class" under Rule 23(a)(2) may be "derived from the settlement rather than from the [plaintiffs'] complaint." CA 56a-57a. The panel further held that Rule 23(a)(3)'s requirement that the "claims or defenses of the representative parties" be "typical" of the class required no reference to the claims actually pleaded in the class complaint, but that "typical" interests, such as the class members' "interests in maximizing recovery for the class and eliminating the risk posed by the insurance coverage litigation" (CA 57a), could instead arise from the settlement itself.

The panel rejected Petitioners' arguments that the class failed Rule 23(a)(4)'s requirement of adequate representation because both the class and its counsel were riven by the internal and external conflicts described above. Without actually contesting the existence of these conflicts, the panel majority simply held these conflicts were "overwhelmed" by the common interest of all class members in obtaining a settlement. CA 67a-72a.

Despite the fact that the class complaint pleaded, and the settlement released, individual personal injury damages claims



against Fibreboard rather than equitable or "*in rem*" claims against a trust or a *res*, the Fifth Circuit upheld the certification of a mandatory class under Rule 23(b)(1)(B) because the possibility that Fibreboard might lose the insurance coverage litigation it had been winning for years, and therefore might someday become insolvent, created a "'risk' that separate adjudications 'as a practical matter' would 'substantially impair or impede' the interests of the class." CA 78a. The circuit court held that *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), does not require that class members be afforded an opportunity to opt out of the class.

Petitioners argued that the Rules Enabling Act, 28 U.S.C. § 2072, and related principles of federalism, prohibit the federal judiciary from using Rule 23(b)(1)(B) to effect such a mandatory, *pro rata* abridgement of the class members' substantive state-law rights against a defendant that is not in bankruptcy or receivership. But the Fifth Circuit held that its novel use of Rule 23(b)(1)(B) created "a superior alternative to the Bankruptcy Code" (CA 78a) and that it was therefore empowered to "circumvent[]" "the terms and principles of the Bankruptcy Code." CA 78a.

Finally, the court of appeals brushed aside Petitioners' arguments that the district court lacked subject-matter jurisdiction to approve this collusive settlement of unaccrued, future damages claims (CA 86a-88a), and that adequate notice could never be given to legions of uninjured class members who may not even know of their exposure to asbestos, let alone be able intelligently to evaluate a proposed settlement so as to decide whether to object. The dissent deemed these defects insurmountable. CA 113a-116a; 154a-181a.

Judge Smith castigated the majority for "legislat[ing] a bold and novel tort reform proposal thinly disguised as the settlement of a lawsuit." CA 104a. Indeed,"there never was a lawsuit: Fibreboard and its hand-picked class counsel agreed to file a suit only if they had already settled it." CA 104a. This settlement "is purely legislative: Class members' causes of actions are repealed in favor of the equivalent of a workers' compensation regime." CA 105a.

**6. The Fifth Circuit Decision After Remand.** This Court vacated the Fifth Circuit's decision and remanded the case for reconsideration in light of *Amchem Products v. Windsor*, 117 S.Ct. 2231 (1997). CA 36a. Over a strenuous dissent (CA 3a-35a), the

same panel majority issued an unsigned opinion just five paragraphs long, reinstating its prior decision. CA 1a-2a.

## SUMMARY OF ARGUMENT

**I.** In *Amchem*, this Court held that a similar settlement-only, nationwide, asbestos future-claimant class could not satisfy Rule 23(a)'s requirements. This Court expressly disapproved the Fifth Circuit's prior decision in this case. 117 S.Ct. at 2247, 2248 & n.16, 2249 & n.18. On remand, however, the court of appeals simply reinstated its prior Rule 23(a) rulings and insisted that *Amchem* was distinguishable because this case was certified under Rule 23(b)(1)(B), whereas *Amchem* involved a Rule 23(b)(3) class action. But the distinction among the Rule 23*(b)* categories makes no difference in the application of Rule 23*(a)*, which imposes four threshold requirements governing *all* class actions.

*Amchem* thus controls this case. Indeed, this case is *worse* than *Amchem*. Here, the Respondents have tried to manufacture common and typical legal questions not by reference to the asbestos personal injury claims pleaded in the complaint and released in the settlement, but by reference to issues raised in a *completely different lawsuit* — an insurance dispute between Fibreboard and its Insurers in California state court. Further, the settling parties have tried to justify this class action (which contains no subclasses) as a "limited fund," which necessarily exacerbates the conflict between present and future tort claimants that this Court held was fatal in *Amchem*.

**II.** In fact, this class action cannot be certified as a "limited fund" class under Rule 23(b)(1)(B). Any "fund" here is simply the contrived product of Fibreboard's unwillingness to contribute its own assets to the settlement, and the Insurers' desire to buy total peace with one limited lump-sum payment on Fibreboard's liability policies. Such self-interested machinations cannot create the predicate for mandatory class certification under Rule 23(b)(1)(B). Nor can the risk of future insolvency create a "limited fund," which is reserved for fixed assets in which claimants have pre-existing interests.

Using Rule 23(b)(1)(B) in this context would abridge class members' rights under state law and violate the Rules Enabling Act. It would also circumvent the bankruptcy laws enacted by Congress,



including a 1994 statute specifically designed for insolvent defendants overwhelmed by present and future asbestos liabilities.

**III.** This mandatory class action violates the Due Process Clause because it adjudicates individual claims for money damages while denying any opportunity to opt out. The absence of an opt-out also deprived the courts below of personal jurisdiction over many class members lacking any contacts with the forum state of Texas.

**IV.** The Fifth Circuit's judgment denies due process and violates Rule 23 for the additional reason that, as this Court recognized in *Amchem*, meaningful notice cannot be given to currently uninjured "future claimants." Many people do not even know that they are class members. Those who do nonetheless lack the ability to evaluate the proposed settlement and decide whether to object.

**V.** There is no justiciable Article III controversy in this case. "Exposure-only" class members do not even have any injury in fact. The plaintiffs' lawyers who were solicited by Fibreboard to file this class action against it never intended to litigate an adversarial lawsuit. The class complaint pleads sham causes of action that the plaintiffs' Class Counsel (and the courts below) admit were a pretext. Indeed, this "class action" is a feigned proceeding staged by Fibreboard and its Insurers. In short, this is a legislative joint venture, not a justiciable controversy.

## ARGUMENT

### I. THE JUDGMENT BELOW DEFIES *AMCHEM*'S HOLDINGS ON RULE 23(a) AND CANNOT MEET THE REQUIREMENTS OF THAT RULE.

#### A. Commonality and Typicality Under Rules 23(a)(2) & (3).

In *Amchem*, this Court described the Fifth Circuit's prior opinion in this very case as holding that a "settlement obviates or reduces the need to measure a proposed class against the enumerated Rule 23 requirements." 117 S.Ct. at 2247. That holding was in turn expressly repudiated by this Court: Rule 23(a)'s specifications "demand undiluted, even heightened, attention in the settlement context." 117 S.Ct. at 2248 & n. 16. Because both the district court and the court of appeals applied a now-rejected, watered-down

standard for class certification, all their findings and rulings on Rule 23(a)'s requirements are invalid. When the Fifth Circuit on remand simply reinstated its prior Rule 23(a) rulings and again deferred to the district court's tainted "conclusions" that Rule 23(a)'s requirements had been met (CA 2a), it was refusing to apply the law laid down by this Court.

In *Amchem* this Court further noted that the Fifth Circuit's prior opinion had held that, "'in the settlement class context,'" the issues that bind a class together under Rule 23(a) "'arise from the settlement itself.'" 117 S.Ct. at 2247 (quoting the Fifth Circuit at CA 56a, which was citing 2 NEWBERG ON CLASS ACTIONS §11.28, at 11-58). *See also* CA 56a-58a (same). That holding was likewise squarely rejected by this Court: the questions that must be "common" to and "typical" of the class under Rules 23(a)(2) & (3) are the "legal or factual questions that qualify each class member's case as a genuine controversy, questions that *preexist* any settlement." 117 S.Ct. at 2249 & n.18 (emphasis added).[10]

Despite this clear directive, the court below ignored the legal and factual questions pleaded in the complaint and instead purported to find Rule 23(a) commonality and typicality in the class members' supposed "common interest" in "seeking equitable distribution of

[10] The authority of class plaintiffs to represent and bind absent class members under Rule 23 is limited by the scope of the class complaint, which describes the typical claims held in common by the class. Class representatives can release only those claims pleaded in the complaint or arising from the very same factual predicate as those pleaded. *National Super Spuds v. New York Mercantile Exchange*, 660 F.2d 9, 18-19 & n. 7 (2d Cir. 1981) (Friendly, J.). *Matsushita Electric Industrial Co. v. Epstein*, 116 S.Ct. 873, 878-79, 883 (1996), is entirely consistent, because there both the state-law claims and the exclusively federal claims arose from the identical factual predicate involving the same transaction. Since the class plaintiffs here do not, by definition, currently possess actionable "future" claims for asbestos personal injury or wrongful death or lost consortium, they do not plead such claims and thus cannot release or settle them on behalf of the class. 7B Charles Alan Wright, Arthur R. Miller & Mary K. Kane, FEDERAL PRACTICE AND PROCEDURE §1797.1, at 46-47 (Supp. 1995).



compensation" under the settlement. CA 3a. The Fifth Circuit thus repeated the very error that *Amchem* had just condemned.[11]

Upon remand from this Court's GVR order, the Fifth Circuit held that it could "find nothing in the *Amchem* opinion that changes our prior decision," because "this class action proceeded under Rule 23(b)(1); *Amchem* was a Rule 23(b)(3) case." CA 2a. But the court of appeals never attempted to explain how that distinction among the categories listed in Rule 23*(b)* could possibly make a difference in the application of Rule 23*(a)*, which imposes "four *threshold* requirements applicable to *all* class actions." *Amchem*, 117 S.Ct. at 2245 (emphasis added). Neither the courts below nor the Respondents have ever offered a principled basis for applying a double standard for 23(a) class cohesion depending on whether the class is on a (b)(3) or a (b)(1)(B) track. The Rule itself precludes any such suggestion: 23(b) expressly provides that "[a]n action may be maintained as a class action *if the prerequisites of subdivision (a) are satisfied*."[12]

If anything, the Fifth Circuit's error is even greater than that of the district court in *Amchem*. Respondents tout the "legal and factual questions presented by the insurance disputes" between Fibreboard and the Insurers and insist that it was by "reference to *these* legal and factual disputes that the Fifth Circuit determined satisfaction of the 'commonality' and 'typicality' requirements of Rule 23(a)." Class BIO 9 (original emphasis); *see also* Ins.BIO 8-9; Fibre BIO 20, 26.

Interesting. But the legal and factual questions raised in the

[11] As Judge Smith explained, *Amchem* held that a common interest in a fair compromise is not enough. CA 19a-20a, 29a, 31a & n.31. The "benefit asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, but it is not pertinent" to certification under Rule 23(a). *Amchem*, 117 S.Ct. at 2249.

[12] It could hardly be otherwise, since those prerequisites for class cohesion and identity of interest were "carefully drawn to meet constitutional requirements," 7B Charles Alan Wright, Arthur R. Miller, & Mary K. Kane, FEDERAL PRACTICE AND PROCEDURE § 1789, at 251 (1986 & 1995 supp.), and are essential for making any virtual representation of an absent class consistent with due process, regardless of which particular class mode is in issue. *Amchem*, 117 S.Ct. at 2248; *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982); *Hansberry v. Lee*, 311 U.S. 32, 43-45 (1940).

insurance coverage litigation are presented *not* in *this* case, but in two *other cases, both independent of this one*—the state court coverage litigation in California and the *Rudd* class action brought by the Insurers to lock in the Trilateral Agreement. *See* nn. 3, 6 *supra*. Respondents note that the plaintiff class's stake as potential beneficiaries of Fibreboard's liability insurance policies was "referred to in the complaint" in this case, Fibre BIO 20 (citing CA 556a-559a)—but those "references" were mere background, not the requisite "'claims or defenses that can be raised in courts of law as part of an actual or impending lawsuit.'" *Amchem*, 117 S.Ct. at 2249 n.18. The actual claims made in the complaint (CA 560a-564a) were *personal injury tort claims against Fibreboard*, not insurance coverage third-party beneficiary claims against the Insurers. Indeed, the *only* claims pleaded are garden variety asbestos personal injury, money-damages claims, including negligent failure to warn, strict liability, and breach of warranty, and they are asserted exclusively "against Fibreboard." CA 564a. Thus the legal issues that, according to the Respondents and the court below, supposedly furnish the requisite commonality and typicality under Rule 23(a) for this class certification involve *not* the claims alleged in this class action, *but the claims in another lawsuit altogether*.

To help Fibreboard win its coverage dispute, perhaps the class could have intervened in the insurance coverage case (on Fibreboard's side of the docket) in California state court, as Class Counsel now suggest. Class BIO 9. And, following any settlement of the coverage case, perhaps the plaintiff class (rather than the Insurers themselves, as actually happened) could have instituted its own *Rudd*-style class action seeking a declaration of the plaintiffs' rights under those policies and any settlement thereof. But Respondents' musings about what "could have" been, Class BIO 9, 28, are simply irrelevant to the certification of *this* class action, which pleads—*and releases*—personal injury tort claims against Fibreboard. A possible interest as contingent third-party beneficiaries in the settlement of an independent insurance coverage dispute being litigated in a state court in California cannot possibly fulfill the Rule 23(a) prerequisites for certification of a separate personal injury class action being litigated in a federal court in Texas.



In *Amchem,* the settling parties at least limited themselves to trying to bootstrap class certification on the basis of the settlement in their *own* action. But the courts below and the settling parties here have transcended the boundaries of space, time and logic in trying to certify a class based on the pleadings and issues addressed in a wholly separate lawsuit. If such remote and extrinsic matters are sufficient to meet the requirements of Rule 23, then that rule would appear to have no limits left at all.

The Fifth Circuit admitted that the "disparate questions undermining class cohesion" in *Amchem*, 117 S.Ct. at 2250 — variations in exposure, family situations, smoking histories, diseases, and state law—would likewise affect the recovery of class claimants here. CA 57a.[13] But the court held that this lack of cohesion was irrelevant because this settlement merely sets up an "equitable distribution process," whereas the settlement in *Amchem* supposedly "award[ed] damages to class members based on the severity of their injuries alone." CA 58a n. 8.

Not so. The *Amchem* settlement, just like this one, merely established an "administrative mechanism" under which claims could be paid; as this Court noted, it did not pre-ordain the amounts to be awarded. 117 S.Ct. at 2240. Claims were to be liquidated "based on all the factors" historically used "to evaluate claims for settlement," including all those individual questions of exposure, causation, and disease. *See Georgine v. Amchem Products*, 157 F.R.D. 246, 276-77 (E.D.Pa. 1994). Those are the very same factors and "individual circumstances" that the Fifth Circuit itself recognized are central to claims processing under the Global Settlement. CA 58a n. 7. Indeed, the circuit court agreed that, because of these differences, "a class action *requesting individual damages* for members of a global class of asbestos claimants would

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[13] Even exposure to asbestos creates no common question of law or fact under Rule 23(a)(2), because to prove class membership and a right to damages all claimants would have to present *individual* proof regarding the circumstances of their exposure to Fibreboard products. As in *Amchem*, class members here were exposed to differently labeled products, "for different amounts of time, in different ways, and over different periods." 117 S.Ct. at 2250. And, both because the composition of Fibreboard products and warning labels varied over the years, and because state laws impose varying standards for negligence and product defect, even Fibreboard's conduct raises no common issues.

not satisfy the typicality requirements." CA 58a n. 8 (emphasis added). *But that is this case*: the Complaint requests the award to each class member of the individual "compensatory damages . . . sustained by each of them respectively." CA 564a. Once one accepts *Amchem*'s holding that class cohesion does not turn on the issues in the settlement, it is clear (even to the court below) that this class flunks Rules 23(a)(2) & (3).

**B. Adequacy of Representation Under Rule 23(a)(4).**

This Court held in *Amchem* that Rule 23(a)(4)'s requirement of adequate representation cannot be met where a mass tort class is riven by a conflict between "currently injured" and "exposure-only" future plaintiffs. 117 S.Ct. at 2251. The goal of the largest possible immediate payouts for the former group "tugs against the interest of exposure-only plaintiffs in ensuring" ample settlement funds "for the future." *Id.* Here, as in *Amchem*, "named parties with diverse medical conditions" from asbestos exposure, represented by a single set of attorneys, "sought to act on behalf of a single giant class rather than on behalf of discrete subclasses." 117 S.Ct. at 2251.[14] If anything, as this Court itself observed in *Amchem*, the conflict between present and future tort claimants is exacerbated when the settlement class is treated, as it was here, as "a 'limited fund' case certified under Rule 23(b)(1)(B)." 117 S.Ct. at 2251. *See also Walker v. Liggett Group*, 175 F.R.D. 226, 231 n. 8 (S.D.W.Va. 1997)("the alleged limited fund exacerbates the apparent conflicts creating what has been described as a zero-sum game")(citing *Amchem*).

Regardless of the size of the settlement fund, the conflict between future claimants and the currently injured is manifested here, as it was in *Amchem*, in the settlement's "essential allocation decisions designed to confine compensation and to limit defendant's

[14] This Court quoted *In re Joint E. & S. Dist. Asbestos Litigation*, 982 F.2d 721, 742-43 (2d Cir. 1992). 117 S.Ct. at 2251. On rehearing, the Second Circuit decided that subclasses were not necessary because, in bargaining for the bankruptcy plan in that case, the parties did not intend to create "legally enforceable rights" to a "first in, first out" payment priority. *In re Findley*, 993 F.2d 7, 9-11 (2d Cir. 1993). That determination is irrelevant here, where the class members' rights to immediate, unrestricted recovery of their tort judgments are established not by a negotiated plan but by state law. See Part II, *infra*.



liability." 117 S.Ct. at 2251. Damages payments from the trust are capped at $500,000 per claimant; pre- and post-judgment interest are forbidden (as are punitive awards); payments are spread out over at least three years (up to ten years for claimants who insist on a trial); and there are other "spendthrift provisions"—all designed to "limit the amount of the trust assets that can be paid out in any given year . . . so that they will be available to compensate injured class members whose claims develop far in the future." CA 49a; 212a.

The Fifth Circuit did not deny the existence of this conflict in its original opinion (CA 67a-72a) or upon remand. CA 3a. Instead, the court simply characterized this conflict between present and future plaintiffs as "competition for earlier and larger shares of available money," and then held that this intra-class conflict—far from being a problem—is "precisely the reason" for a Rule 23(b)(1)(B) class, where such "conflict" can be "controlled for the benefit of all members of the class" by the district court. CA 3a. The very conflict which this Court held to be fatal in *Amchem* was deemed by the Fifth Circuit to be "outweighed" (CA 69a) by each class member's "common interest" in securing a settlement that equitably distributed Fibreboard's insurance fund. CA 3a.

Review of the *fairness* of a settlement's trade-offs is certainly the court's responsibility under Rule 23(e), but the *representation* required by 23(a)(4) is to be provided by unconflicted representatives with separate counsel. Contrary to the *ex post facto*, managerial approach embraced by the courts below for assuring adequate representation, Rule 23(a)(4) mandates *"structural assurance"* of fair representation for "diverse groups and individuals." 117 S.Ct. at 2251 (emphasis added). The "class certification inquiry does not examine the merits of the trade-offs created by a settlement, *but examines whether class representatives and class counsel had authority to trade at all.*" CA 19a (Smith, J., dissenting) (emphasis added).[15]

[15] The settlement proponents were unable to hide behind the district court's "findings" on the subject of class conflicts in *Amchem*, and that ploy should be no more successful here. Whether a set of circumstances amounts to a conflict of interest is a legal question subject to de novo review. CA 141a. Moreover, the clearly erroneous standard of review never applies where findings of fact are made under an erroneous view of controlling legal principles. *Kelley v. So.*

The conflict within this class is further confirmed by Respondents themselves, who concede that the Global Settlement limits and allocates recovery for asbestos injuries in order to "ensure the availability of funds to pay . . . the later-filed claims of exposure-only class members." Class BIO 14; Ins.BIO 13. Respondents defend these restrictions as necessary because the settlement fund "is not large enough to guarantee full payment over a period of many years for all the claims that class members might potentially assert against it." Class BIO 13. The preferences enforced, and the sacrifices imposed on different groups, by Class Counsel acting in their Olympian role as arbiters of the interests of all class members, are put in stark relief by Respondents' observation that, without the various caps and spendthrift restrictions, the settlement would give currently injured class members "unlimited access to the insurance fund for their claims and the devil take the hindmost as to the rest of the class." Fibre BIO 22.[16] But this assertion, like Respondents' frequent cries that the Global Settlement is fair "from the standpoint of the class as a whole," Fibre BIO 22, and that its benefits for the class "'overwhelmed'" and "'outweighed'" the "'divergent'" interests within the class, simply repeat the error of the court below. Ins. BIO 17, 13; Class BIO 11-13. The settlement's fairness is the standard for approving it under Rule 23(e), *not* for addressing conflicts within the class under Rule 23(a)(4). This categorical distinction "serve[s] to inhibit appraisals of the chancellor's foot kind — class certifications dependent upon the court's gestalt judgment

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*Pacific Co.*, 419 U.S. 318, 323 (1974). Here the district court held that "the fairness of the Global Settlement establishes a rebuttable presumption that Class Counsel adequately represented the class." CA 502a. That holding confuses 23(e) with 23(a) and was repudiated by *Amchem*. *See* 117 S.Ct. at 2248.

[16] Class Counsel ultimately retreat to the position that any conflict within the class does not require decertifying the class and voiding the settlement, but at most requires remanding for the creation of subclasses to renegotiate the details of the settlement trust. Class BIO 14. But if such an attempt to unscramble the class action omelette were an adequate remedy, that step would have been ordered by the Third Circuit and this Court in *Amchem*, where the very same intra-class conflict voided the class certification. Conflicts under 23(a)(4) taint the class certification *ab initio*, and the only proper course is to decertify the class and leave the parties to start over, if they wish.



or overarching impression of the settlement's fairness." *Amchem*, 117 S. Ct. at 2248.

There is also a disabling conflict between those class members first exposed to asbestos before 1959 (when Fibreboard had unlimited coverage under its policies with the Insurers) and those exposed after 1959 (for whom there was no remaining insurance and recovery could be had only against Fibreboard's own assets). It is undisputed that, prior to the settlement, the claims of pre-1959 victims were, as one would expect, enormously more valuable than those of the post-1959 victims. CA 148a-150a & n.49. Yet, without separate representation for these groups, the settlement sacrificed the fortunate status of pre-1959 claimants to benefit the class as a whole, *id.*, thus "forc[ing] the pre-1959 claimants to give up something of value that is legally their due—their cause of action against an insured Fibreboard—in order to benefit a group of claimants to whom they owe nothing." CA 25a (Smith, J., dissenting).[17]

In addition to the conflicts that divided this class internally, Class Counsel's representation was inadequate here because of their conflicting duties to their thousands of individual clients *outside* of the class. *Cf. Amchem*, 117 S.Ct. at 2239. As Respondents' own ethics expert witness admitted, the present clients of class counsel were in fact competing with future claimants for whatever settlement dollars Fibreboard and its Insurers were willing to pay, since there was some "reserve price" which the Insurers were unwilling to exceed in settlement of all claims. JA 366a. *See also* JA 281a-82a, 299a-303a; *Amchem*, 117 S. Ct. at 2251 (noting conflicts with

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[17] Respondents assert that this conflict was eliminated before the Global Settlement was negotiated by the April 9, 1993 agreement in which Fibreboard and Continental supposedly agreed to ignore the distinction between pre- and post-1959 claimants. Class BIO 17 n.8. But this is belied by the separate Ness, Motley inventory settlement which likewise discriminates between these groups, even though it too was reached after the April 9 agreement. That settlement shows that the Respondents themselves, like the tort system, continued to assess a pre-1959 claim at three times the value of a post-1959 claim. JA 80a; CA 149a & n.49 (Smith, J., dissenting). The pre-1959 group therefore had a great deal to lose in a Global Settlement that supposedly treated all claimants alike.

respect to allocation of settlement resources in "limited fund" setting).[18]

Class Counsel's conflicting duties manifested themselves in the form of "inventory" settlements for their individual clients that provided for payments contingent upon approval of a class settlement in this case — while Class Counsel gerrymandered the class definition to ensure that their own individual clients were not encompassed within the class. Once those inventory side deals were reached, Class Counsel owed it to their individual clients to reach *any* class settlement, on *any* terms that could survive the court approval process, and that necessarily hampered Class Counsel in seeking the best possible settlement for the class. CA 142a-143a.[19] Indeed, at least 45,000 of Class Counsel's individual clients were, by Counsel's own admission, "opted out" of the Global Settlement and were provided separate deals in the inventory settlements, even if they had no lawsuit filed against Fibreboard when the class action was instituted. *See* JA 119a. *See also Amicus Curiae* Brief of Law Professors (discussing gerrymandering of the class definition). This demonstrates that Class Counsel had far greater faith in the value of their side deals than they did in the value of the Global Settlement that they have imposed on hundreds of thousands of unknowing future tort victims.

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[18] *See also In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300, 304 (6th Cir. 1984) (finding class counsel inadequate to represent both "present" claimants, who had already filed lawsuits, as well as potential future claimants); *Kuper v. Quantum Chem. Corp.*, 145 F.R.D. 80, 83 (S.D. Ohio 1992) (finding inadequate representation due to concurrent representation of potentially competing claimants outside the class); *Jackshaw Pontiac v. Cleveland Press Publishing Co.*, 102 F.R.D. 183, 192-93 (N.D. Ohio 1984) (same).

[19] Full payment of the inventory side deals would also occur in the event of a final victory for Fibreboard in its coverage lawsuit against the Insurers, but of course Class Counsel had no way to control that contest, whereas acceptance of a Global Settlement was entirely within their grasp.



## II. THE RULES ENABLING ACT, RULES OF DECISION ACT, RULE 23 AND PRINCIPLES OF FEDERALISM ALL PROHIBIT MANDATORY CLASS TREATMENT OF THE INDIVIDUAL, *IN PERSONAM* CLAIMS FOR DAMAGES ALLEGED IN THIS CASE.

### A. This Case Is Not Cognizable As A Limited Fund Class Action Under Rule 23(b)(1)(B).

Although this class cannot satisfy the requirements of Rule 23(a) as set forth in *Amchem*, the certification of this mandatory class under Rule 23(b)(1)(B) raises even more disturbing problems of manipulation of the federal rules—problems that were not presented in *Amchem*. Rule 23(b)(1)(B) provides that a case may be maintained as a class action if "the prosecution of separate actions by or against individual members of the class would create a risk of adjudications" that would "as a practical matter be dispositive of the interests of other members ... or substantially impair or impede their ability to protect their interests." The Fifth Circuit held that this standard was met on the ground that "Fibreboard is a limited fund." CA 73a.[20] This holding was error. Indeed, the shifting explanation

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[20] Although Rule 23(b)(1)(B) does not use the actual words "limited fund," it is undisputed that the rule "necessarily contemplates the allocation of a limited resource," because "only where the class members' interests are to some degree mutually exclusive will the individuals' litigation 'substantially impair' the others' rights." CA 8a n.7 (Smith, J., dissenting). "Thus, where the remedy sought is money damages, the paradigm is of a 'limited fund' to be distributed for the class members' benefit." *Id.* The Fifth Circuit majority agreed, repeatedly noting that whether this class can be certified turns on whether Fibreboard properly constitutes "a limited fund appropriate for adjudication under Rule 23(b)(1)(B)." CA 74a; *see id.* at 73a, 75a, 77a. The district court, in a holding not embraced by the Fifth Circuit, held in the alternative that a "class may be certified under Rule 23(b)(1)(B) irrespective of whether a 'limited fund' may be said to exist." CA 491a. But the cases cited by the district court involved injunctive or similar class-wide relief, not exclusively claims for damages. *See White v. Nat'l Football League*, 822 F.Supp. 1389, 1409, 1411 (D.Minn. 1993) (class sought injunction dealing with contract rules affecting all players), *aff'd on other grounds*, 41 F.3d 402 (8th Cir. 1994); *Specialty Cabinets v. American Equitable*, 140 F.R.D. 474, 477-78 (S.D.Ga. 1991)(class sought to enforce commonly held fiduciary duties under ERISA plan that by law could

by Respondents and the courts below as to precisely *what* constitutes the "limited fund" here underscores that Rule 23(b)(1)(B) cannot be satisfied in this case as a matter of law.[21] No selection from the smorgasbord of justifications offered in support of a (b)(1)(B) class here can survive scrutiny.

Initially, the Fifth Circuit defined the limited fund as "the present value of Fibreboard's *non-insurance* assets." CA 73a (emphasis added). But the exclusion of insurance assets is wholly arbitrary — especially because, at the time the settlement was negotiated and approved, the California court had repeatedly ruled in Fibreboard's favor in the coverage dispute. *See* page 2, *supra*. To say that, *apart* from the insurance assets, Fibreboard's funds are limited is to miss the big issue—rather akin to asking, "Apart from *that*, Mrs. Lincoln, how did you like the play?"

As a hedge against the transparent ruse of excluding Fibreboard's insurance, the courts below held "[a]lternatively" that "the 'limited fund' may be viewed as the sum of the value of Fibreboard plus the value of its insurance coverage." CA 492a; CA 73a. This "fund" is a mixture of the unreal and the surreal: unreal, because Fibreboard's assets were never on the negotiating table and Fibreboard contributed virtually nothing to the Global Settlement, given its adamant position that insurance pay for all its asbestos liabilities; surreal, in that the courts below limited the value of Fibreboard's insurance policies to the amount Fibreboard and its Insurers agreed upon in the Trilateral Agreement, even though those policies had no aggregate liability cap and the Insurers thus faced, as the circuit court conceded, "virtually unlimited liability for damage[s]." CA 75a.

As a third alternative, the district court held that "the disputed insurance asset liquidated by the $1.535 billion Global Settlement may be viewed as a limited fund." CA 491a. In essence, the courts

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inure to benefit only of class as a whole).

[21] During opening arguments, Judge Parker inquired as to Respondents' theory of a limited fund. Class Counsel replied, "Each one of the participants at these counsel tables have [*sic*] a different view of how one might approach Rule 23," which prompted the court to observe, "You dodged that question very well, counsel." JA 31a-33a.



below held that, even though Fibreboard was insured without limit by two robust liability carriers, the mere existence *ex ante* of a risk that Fibreboard might lose on appeal in the insurance coverage litigation (which, of course, Fibreboard did not), was enough to permit the parties to negotiate a "limited" fund justifying certification of a mandatory class.[22] But if that were true, a federal court could force all potential plaintiffs, including exposure-only claimants whose causes of action had not yet accrued, to give up their rights under state law and to share, through an ADR scheme imposed on them by persons with interests different from theirs, in a fund that — unlike the unlimited insurance pool that otherwise would have been available but for the deal struck by the settling parties — is limited only by the economic self-interest of Fibreboard and its Insurers. That is not — and cannot be — the law.

Fourth and finally, the courts below offered a pseudo-bankruptcy rationale for certification under (b)(1)(B), based on Fibreboard's potential for insolvency if (contrary to what ultimately happened) it had lost the insurance coverage litigation. CA 74a. But, as we will explain in detail below, Rule 23(b)(1)(B) was not promulgated as a substitute for bankruptcy or receivership, and application of the Rule in this context violates the Rules Enabling Act and the Rules of Decision Act.

**1. The "limited fund" in this case was contrived.**

Whatever its guise, the supposed "limited fund" on which the courts below predicated mandatory class certification was not a fact of life foisted upon the parties by past events. Nor was it the result of circumstances beyond the control of Fibreboard and its Insurers. Rather, in the candid words of the district court, the limited fund at issue here is a "*prospective* fund that's been *negotiated*." JA 31a (emphasis added). But such self-interested intrigues by parties (and

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[22] The district court relied on *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989), for the proposition that a (b)(1)(B) limited fund can be created by the settlement of an insurance dispute. CA 491a. But that class action was ultimately certified under Rule 23(b)(1)*(A)* not (b)(1)(B), *id.* at 742, and the insurance policies at issue there, unlike those held by Fibreboard, capped aggregate liability coverage at a stated amount. Id. at 741.

Class Counsel purporting to represent millions of absent parties) cannot create the predicate for mandatory class certification under Rule 23(b)(1)(B).

Fibreboard's "corporate goal" was to "resolve its asbestos liabilities" wholly through its "insurance resources," without using a dime of its own equity to fund a settlement. CA 577a; JA 104a. The Insurers—who had consistently lost to Fibreboard on all issues in the coverage litigation in the trial court in California—were on the hook for unlimited liability because the policies they had issued to Fibreboard *had no aggregate limit*. Hence the Insurers had to admit under oath that there was no "capped amount of money" in this case. JA 281a. The "insurance companies' resources . . . were for practical purposes *without limit*"; there was "*no artificial limit* on the amount that the insurance companies could pay to settle this case." JA 368a (emphasis added). Thus, the *only* limit on the funds available to resolve future asbestos claims was "that there was obviously some overall cost to the insurers that they ultimately would conclude they weren't prepared to exceed" in their settlement negotiations. JA 281a-82a. But every settlement, every fund, is "limited" in that obvious sense. In the Insurers' words, the "proposed settlement would thus operate to create for the first time the very 'limited' fund that would then be subject to equitable allocation under Rule 23(b)(1)(B)." JA 527a. The district court accordingly ruled that the "Global Settlement created the fund." CA 518a.

Respondents admitted at the fairness hearing that "of course" the Insurers "could . . . have settled with the plaintiffs on a (b)(3) opt-out class." JA 114a. But the prospect of someday having to pay tort judgments to opt-outs not covered by the settlement would have spoiled the Insurers' hope of "total peace," so the Insurers were "adamant that any global agreement here would have to be done on a non-opt-out basis." JA 37a, 36a. *See also* CA 43a.

Class Counsel initially opposed the Insurers' demand for a (b)(1)(B) class, arguing that it would be "not only legally deficient, but unworkable practically" (JA 571a) because there was no limited fund here. JA 559a. Fibreboard was "not willing to put all of its assets before the court to divide among the asbestos plaintiffs." *Id.* Hence a mandatory class would violate "the definition of a limited fund proceeding," by "forc[ing]" class members to "settle their



claims against a fund that contains less than all of the assets that should be available to pay those claims." JA 560a. Class Counsel also pointed out that the insurance policies could not be considered a limited fund, because the Insurers' "liability to Fibreboard" was not "limited to some finite amount of insurance money or other *res* that will be insufficient" to resolve all claims. JA 559a.

Class Counsel testified under oath that they changed their minds and accepted a mandatory (b)(1)(B) class when Continental "came to the table and brought its checkbook." JA 114a. And the Insurers confirmed that their insistence on a (b)(1)(B) as opposed to a (b)(3) class action greatly increased the cost of the settlement:

> Continental's insistence on a no-opt-out transaction cost Continental in the price negotiations. Continental was compelled to pay more money as the price of a global settlement in order to secure total peace. And Continental as a corporate matter made the decision that it was prepared to pay more ... in order to put it to bed once and for all, no opt-outs. ... We paid for it.

JA 37a. Thus, the "fund" that the courts below deemed "limited" in fact *got bigger* when the Insurers demanded the move from a (b)(3) opt-out class to a mandatory (b)(1)(B) class. *The type of class action acceptable to the Insurers—i.e., a mandatory class— dictated the size of the so-called limited fund.* In the words of Rule 23(b)(1)(B), the ability of class members here to protect their interest in full recovery for their asbestos injuries is not "impair[ed] or imped[ed]" by a limited fund — it is impaired by the Respondents' foisting upon the class members a non-opt-out class action that limits all future claimants to recovery from a fund whose limits have been imposed by the Respondents.

This turns Rule 23 on its head. The parties' preference for a mandatory class surely cannot justify the imposition of a limited fund. Rather, it is the pre-existence of an insufficient fund, created by legal or factual circumstances beyond the parties' control, that is supposed to justify the employment of a mandatory class. The judgment below sanctions a regime in which "limited" funds can be contrived by defendants and class counsel, with the opt-out rights guaranteed by Rule 23(b)(3) being bargained away on the basis of

the corporate policies of defendants and insurers and the monetary demands of Class Counsel.

This settlement fund is therefore "limited" only in the sense that literally every settlement is limited: there is always an upper limit to what any defendant and its insurers are willing to pay. If that phantom limitation, imposed solely by the defendant's bargaining posture, suffices to justify application of Rule 23(b)(1)(B), as the court below held it does, then *every* settlement of class claims for money damages would be eligible for treatment not only under Rule 23(b)(3) but also under the more lenient and less protective Rule 23(b)(1)(B), which lacks both a predominance requirement and an opt-out right. In that event, the (b)(3) safeguards that this Court upheld in *Amchem* would be for naught.

**2. The risk of future insolvency cannot create the "limited fund" required by Rule 23(b)(1)(B).**

The Fifth Circuit also equated a "limited fund" with a risk of future insolvency (based on a forecast of potential future tort claims and a prediction of a loss in a separate lawsuit involving insurance coverage) (CA 74a), notwithstanding the court's own finding that, "in spite of the threat posed by future personal injury litigation, Fibreboard is currently solvent and healthy." CA 78a. Yet it is hornbook law that a Rule 23(b)(1)(B) limited fund is "a *fixed asset* or piece of property . . . in which all class members have a *pre-existing* interest."1 NEWBERG ON CLASS ACTIONS §4.09 at 4-32-33 (emphasis added). Classic illustrations include competing claimants to a trust, company assets in a liquidation sale, or a vessel involved in a maritime accident suit. *Id.* The potential for future "monetary insolvency of a defendant does not create a classic instance of a limited fund." 3 NEWBERG ON CLASS ACTIONS §17.15A at 3S-16 (3d ed. Supp. 1994). "In the event an entity is insolvent, bankruptcy law is normally the source of protection to assure a fair and orderly distribution of assets insufficient to meet claims." 3 NEWBERG ON CLASS ACTIONS §17.15A (3d ed. Supp. 1995).[23]

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[23] Respondents' citations to 18th and 19th century cases concerning mandatory class suits that were the precursors to suits under Rule 23(b)(1)(B) in fact support our point. Ins.BIO 22-23. All of those cases involved claims of commonly held rights or separable rights asserted against a common fund or specific property. It is undisputed that the claims pleaded and released here are very different. Respondents cite Prof. Chaffee's discussions of suits at law involving rights held in common to a pre-existing *res* (e.g., a bank in receivership, a "bankruptcy," or "a communal mill"). Z. Chaffee, SOME PROBLEMS OF EQUITY 151, 159, 285 (1950). But Prof. Chaffee acknowledged that mandatory class suits—those which could resolve class members' claims and bind them in their absence—were historically limited to the *in rem* context, where "all the members are connected similarly with land or money within the jurisdiction." *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1308 (1932); *see also Christopher v. Brusselback*, 302 U.S. 500, 504 (1938)(limiting scope of binding effect of class actions to cases "affecting [class members'] interest in property within the jurisdiction of the court"). "On the other hand, if the unjoined persons have special claims or liabilities, their rights are personal and cannot be concluded in their absence." *Id.* *See also* Robert Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U.L.Rev. 213, 282 (1990)(if the claims of class members "had a direct effect on the personal rights or duties of individual class members by, for example, adjudicating ... tort liability," then the action was "spurious" and did not bind non-participating class members). *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 298, 311-12 (1853), involved the division of shares of existing property held in common by the members of a religious association. All of the old English cases cited by Respondents likewise involved claims held in common to a pre-existing *res* (and usually by people with a pre-existing jural relationship), such as rights by a ship's crew under a ship's articles to a privateering prize, rights under a previous decree to tithes from parishioners, rights to shares of property under a partnership agreement, or the application of a tax to an annuity arising from a commonly held trust estate.



In breaking with this traditional understanding of Rule 23(b)(1)(B), the Fifth Circuit based its "insolvency" analysis on the Advisory Committee Note to the 1966 Amendment to Rule 23, and held that "a limited-fund class action is appropriate in actions by creditors 'when the debtor's assets are insufficient to pay all creditors' claims.'" CA 77a (quoting the Note). But the rest of the sentence in the Note, which the court below did not quote, reveals that the Advisory Committee was not advocating the use of 23(b)(1)(B) any time a defendant anticipates a risk of future insolvency, but approving use of that Rule only in "an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtors' assets are insufficient to pay all creditors' claims." Advisory Committee Notes on 1966 Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 101

(1966) ("Adv.Comm. Note"). In such a case the action would involve recovery of a particular, fraudulently conveyed asset (hence, a limited fund) and would lie against the recipient of the asset, not the insolvent debtor.[24]

The Advisory Committee Note also states that a (b)(1)(B) class is appropriate "when claims are made by numerous persons against a fund insufficient to satisfy all claims." 39 F.R.D. at 101. This is the classic statement of the "limited fund" construction of the Rule, but the Advisory Committee's citation of *Dickinson v. Burnham*, 197 F.2d 973 (2d Cir. 1952), *cert. denied*, 344 U.S. 875 (1952), demonstrates that the Committee was not, as the Fifth Circuit would have it, sanctioning the use of (b)(1)(B) as a general bankruptcy substitute whenever the defendant offers a forecast of its future insolvency. The defendant in *Dickinson* was not an insolvent debtor, but was instead the holder of the funds fraudulently conveyed by the debtor: those limited funds were treated as a constructive trust and the claims against that trust were—pursuant to applicable substantive law—subject to *pro rata* reduction.[25] Thus nothing in the Advisory Committee Note or in the cases it invokes even remotely suggests that Rule 23(b)(1)(B) may be used as an alternative to bankruptcy to

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[24] This is confirmed by the case cited by the Advisory Committee on this point, *Heffernan v. Bennett & Armour*, 243 P.2d 846 (1952), which approved a class action brought by a creditor to recover a fraudulent conveyance where the "fraudulently transferred property" was fixed, identifiable, and in "the custody of the court." *Id.* at 862. The *Heffernan* court likened the case before it to a representative suit brought "for an accounting on a trust fund," or on behalf of the "beneficiaries of a voting trust agreement," or to "impress a trust upon certain property in behalf of ascertainable beneficiaries," or to settle questions "common to all of the subscribers of a reciprocal or interinsurance exchange." *Id.* at 863. But here there is no such pre-existing, fixed, identifiable common property or fund. The "limited fund" in this case was contrived.

[25] The class representatives brought equitable claims seeking the imposition of a constructive trust on those funds, and then a *pro rata* distribution. *Dickinson*, 197 F.2d at 979-80. The court "limited recovery to the funds" held in constructive trust because the claims of the complaining parties were understood to be *in rem;* indeed, the court noted that nobody claimed the class "should have recovery from [the debtor] as on an ordinary tort liability for conspiracy and defrauding." *Id.* at 980.



collectively resolve *in personam* tort claims asserted against the insolvent debtor itself.[26]

As the Reporter for the Advisory Committee that wrote Rule 23(b)(1)(B) observed 30 years ago, "it would strain interpretation to say that particular actions by injured parties in a mass tort will 'impair or impede the ability of the other members to protect their interests;' th[is] clause is redolent of claims against a fund."[27]

### B. The Abridgement of Class Members' Rights Under State Tort Law Violates the Rules Enabling Act.

In *Amchem*, this Court repeatedly stressed that Rule 23's requirements "must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.' 28 U.S.C. § 2072(b)." 117 S.Ct. at 2244. *See id.* at 2248, 2252. The Fifth Circuit ignored this command.

This is a diversity action. Pursuant to the Rules of Decision Act, the substantive rights of class members are therefore defined by "[t]he laws of the several states." 28 U.S.C. §1652. The class complaint pleads claims under state law for personal injuries from asbestos. CA 560a-63a. The prayer for relief seeks the award to

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[26] The Note's subsequent observation that "[s]imilar problems, however, can arise in the absence of a fund either present or potential," refers to cases in which the problem is not a limited resource to which many lay claim, but, for example, an "injunction secured by one of a numerous class" that "disable[s] the opposing party from performing claimed duties toward the other members of the class." 39 F.R.D. at 101-102.

[27] Letter of Benjamin Kaplan, at 2 (Feb. 7, 1963), Congressional Information Service Records of the U.S. Judicial Conference, Committees on Rules of Practice and Procedure 1935-1988, No. CI-6312-32. An eminent contemporary observer has concluded that "[t]he original concept of the limited fund class does not readily fit the situation where a large volume of claims might eventually result in judgments that in the aggregate could exceed the assets available to satisfy them, much less where the claimants may have a right to individual jury trials . . . . [T]he use of subdivision (1)(B) might be seen as an end run around the bankruptcy law, giving the defendant some of the benefits of bankruptcy without its burdens." William Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L.REV. 837, 840 (1995).

class members of the individual "compensatory damages . . . sustained by each of them respectively," as well as "punitive damages." CA 564a. The Fifth Circuit conceded that the substantive rights at issue here are plaintiff class members' state-law "damages" claims for "personal injuries." CA 58a, 76a. The district court similarly conceded that the class claims pleaded here are "*in personam* in character." CA 518a.

It is likewise undisputed that "an injured party has an *in personam* claim against the person responsible for his injury," that such a claim is "not limited by the amount of insurance carried by a defendant, nor by its liquid assets or net worth," and that a "final judgment against the defendant becomes much like any other debt, able to be collected from any of a defaulting debtor's existing or after acquired assets." CA 10a (Smith, J., dissenting).[28] Thus, if a class member individually prosecuted her personal injury claim against Fibreboard and secured a judgment, state law would provide that the judgment—whatever compensatory and punitive damages and interest were awarded—would be immediately enforceable against the company *in full*, and no other class member could interfere with collection of that judgment unless and until Fibreboard declared bankruptcy or was subjected to a receivership. "The contest of multiple plaintiffs for the limited assets of a common defendant is one which the common law has generally solved in terms of chronological priority." *David v. Bauman*, 196 N.Y.S.2d 746, 748 (N.Y.Sup.Ct. 1960).[29]

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[28] It is common ground that the "first and most obvious consequence of a judgment" is that it immediately "confers upon the successful party the right to issue execution or other process of the court for its enforcement." *Clarke v. Brown*, 244 A.2d 514, 518 (N.J. Super. 1968).

[29] "Phrases such as 'race of diligence' and 'first in time, first in right' are thus common in commercial matters. . . . Unless some legislative policy otherwise requires, there is no reason to treat the contest of multiple tort plaintiffs differently; while their claims originate differently, the ultimate goal of each is to be classed as a creditor in order to proceed against the assets of the defendant." *David v. Bauman*, 196 N.Y.S.2d at 748. *See also Duprey v. Security Mut.Cas.Co.*, 256 N.Y.S.2d 987, 989 (N.Y.App.Div. 1965)(the change from common law rule of first come, first served to *pro rata* distribution is "solely within the prerogative of the legislature"); CORPUS JURIS SECUNDUM §1697 Multiple Claims; Priorities and Settlements (1993)("first in time, first in right").



Ignoring the priority established by state law, the Fifth Circuit forthrightly admitted that the very purpose of the mandatory class certification here was "to effect a *pro rata* reduction of all claims." CA 82a. When the district court conceded that the class members' "'claims were, *prior to settlement*, *in personam* in character,'" it was implying that, in its view, "the settlement transformed the claims into something *other* than *in personam* claims." CA 156a n.56 (Smith, J., dissenting)(quoting the district court at CA 518a) (emphasis added). Respondents likewise concede that the whole point of the class certification here was to abridge state-law rights "by limiting class members' rights to obtain immediate and full payment of their individual state-law claims." Class BIO 20.[30]

This application of Rule 23(b)(1)(B) violates the Rules Enabling Act and the Rules of Decision Act. The court below "now takes away state-law rights of those who have been damaged in tort and allows the asbestos victims only a *pro rata* share in an artificially limited settlement fund." CA 13a (Smith, J., dissenting). And, by utilizing a procedural rule—Rule 23(b)(1)(B)'s mandatory class—to abridge and modify the substantive rights enjoyed by class members under their respective states' laws, the courts below have ignored the constitutional principles of separation of powers and federalism that undergird those statutes and are essential to the integrity of the federal judicial system. Rule 23(b)(3) provides a mechanism for aggregating individual, *in personam* claims for money damages if the stringent requirements of the rule are met. *See Amchem*. But because the possibility of mass opt-outs from the class under (b)(3) would have spoiled the Insurers' and Fibreboard's attempts to rid themselves of all future asbestos liability (CA 43a-48a), the Respondents and the courts below tried to shoehorn these damages claims into a Rule 23(b)(1)(B) class.

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[30] While the theory underlying the mandatory class certification here presupposes a *pro rata* reduction of class members' claims even in the *absence* of any settlement, the settlement itself imposes additional substantive limits on state-law rights. See *supra* page 8. Given that the Respondents never intended to litigate this class action (nor can anyone imagine how such "litigation" could have proceeded), these abridgements of substantive rights are effectively accomplished by the class certification itself.

As explained above, the fiction invoked by the circuit court was that this case is actually "an action *in rem*" (CA 84a) because of the risk of Fibreboard's future insolvency (CA 74a), supposedly allowing *pro rata* reduction of the class members' claims. But calling it that does not make it so. When genuine *in rem* claims are at issue — against a receivership, a vessel, a trust fund — the underlying substantive rights of plaintiffs are by their nature *already* limited by any competing claims against the same limited *res*. Therefore the Fifth Circuit's attempt to wedge its holding under the authority of other cases involving mandatory classes (CA 74a, 84a) is unavailing because those were *bankruptcy* cases where the underlying rights of the class members *were already limited* to a *pro rata* distribution of a *res* created by bankruptcy proceedings *before the class actions were initiated*. Everyone agrees that, under the Bankruptcy Code, a court "ha[s] authority to make changes in the state-law rights of creditors and to replace those rights with a new set of state-law rights." *In re Joint E. & S. Dist. Asbestos Litig. (Findley II)*, 982 F.2d 721, 734 (2d Cir. 1992).[31]

To be sure, even *in personam* claims such as the class members' state-law tort claims against Fibreboard can, in special circumstances not present here, be reduced, consistent with due process and federalism, to *in rem* claims to a *pro rata* share of a limited fund — in a traditional equity receivership. If "'it appears there will be a deficiency of assets, so that all the creditors cannot be paid in full, . . . the court will make a decree for the general administration of the estate,'" and order a distribution of assets "'agreeable to equity.'"

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[31] *See Findley II*, 982 F.2d at 735 (Rule 23(b)(1)(B) proper where court was exercising "*in rem*" jurisdiction over a pre-existing "trust" established pursuant to order of a prior bankruptcy reorganization and class members were seeking equitable distribution, pursuant to New York state trust law, of that trust); *In re Joint E. & S. Dist. Asbestos Litig. (Findley III)*, 78 F.3d 764, 777-78 (2d Cir. 1996) ((b)(1)(B) proper because case "is not an action for money damages but is rather an action in equity for the restructuring of the Trust" already established pursuant to the statutory authority of a bankruptcy court); *In re Drexel Burnham Lambert Group*, 960 F.2d 285, 288-92 (2d Cir. 1992) ((b)(1)(B) appropriate in connection with bankruptcy reorganization of Drexel's "estate" ), *cert. dismissed*, 113 S.Ct. 1070 (1993); *see also Findley II*, 982 F.2d at 738 (noting that *Drexel* involved a "traditional limited fund" in which the class settlement was regarded by the court of appeals as a prerequisite to a successful bankruptcy reorganization).



Joseph Story, COMMENTARIES ON EQUITY PLEADINGS, §100, at 99-100 n.1 (9th ed. 1879). Thus mandatory class treatment might be proper if the corporate defendant "had become insolvent" and the plaintiffs "were compelled to look to a common fund in the hands of a receiver for the payment of their claims"—"they would then become claimants in a receivership." *Penn. Co. for Insurances v. Deckert*, 123 F.2d 979, 983 (3d Cir. 1941). But in a receivership "the *whole* administration and settlement of the estate is assumed by the court," *all* "the assets are *marshalled*," and the decree takes in and binds "*all* the creditors." COMMENTARIES, §99, at 96 (emphasis added).[32]

Here, only a gerrymandered subset of the class of Fibreboard's potential future asbestos personal injury creditors is subject to the Fifth Circuit's *pro rata* cram-down. All other personal injury claimants, as well as asbestos property damage claimants, banks, lenders and any other tort or trade creditors Fibreboard may have, are exempted from this ersatz receivership. Most important, Fibreboard's *shareholders* are exempt because it contributed a paltry $500,000 to the settlement fund, thereby retaining 99.8% of its equity. JA 84a, 104a; CA 329a. This is so despite the Fifth Circuit's own admission that a "limited-fund" action can proceed to bind "unknown or unavailable claimants" *only* when "such an action has before it for disposition *all the assets* in which class members could claim an interest." CA 84a (emphasis added). Creditors have an absolute "equitable right to be preferred to stockholders against the full value of all property belonging to the debtor corporation." *Kansas City Terminal Ry. v. Central Union Trust Co.*, 271 U.S. 445, 454 (1926). No receivership in which shareholders' equity is favored at the expense of creditors' claims could ever be deemed "equitable."[33]

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[32] *See also* COMMENTARIES, §99, at 97 n.1 ("'in the case of creditors of an insolvent estate . . ., all the parties interested in the fund must in general be brought before the court, so that there may be but one account, and one decree, settling the rights of all.'").

[33] "The words 'fair and equitable' are words of art; we have made unmistakably clear that compromising the rights of senior creditors to protect junior creditors is not 'fair and equitable' treatment." *United States v. Key*, 397 U.S. 322, 333 (1970)(Douglas, J., concurring). *See also Consolidated Rock Co.*

The decision below rests on the premise that the adoption of Rule 23(b)(1)(B) wrought a radical change in these ancient principles of equity governing rights in the case of insolvent judgment debtors. But it is inconceivable that the drafters of (b)(1)(B) intended to create a revolutionary new form of pseudo-receivership in which the debtor's equity is left untouched while those whom the corporate debtor has injured most grievously—the personal injury tort creditors—are forced to bear alone the entire brunt of a *pro rata* cram-down in the face of contrary state law.

Such modification of substantive state-law tort rights can, of course, be accomplished pursuant to the Bankruptcy Code, which "converts the creditor's legal claim into an equitable claim to a *pro rata* share of the *res*." *Katchen v. Landy*, 382 U.S. 323, 336 (1966). But Congress holds this power to modify substantive rights under Article I, § 8 of the Constitution, whereas the Rules Enabling Act expressly denies such power to the federal judiciary when promulgating procedural rules. "Rule 23, which must be interpreted with fidelity to the Rules Enabling Act," simply "cannot carry the large load [the settling parties] and the District Court heaped upon it." 117 S. Ct. at 2252.[34] Here, the Respondents have heaped upon Rule 23(b)(1)(B) a load even more crushing than that in *Amchem*.

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*v. Du Bois*, 312 U.S. 501, 529 (1941)(if creditors "receive less than that full compensatory treatment, some of their property rights will be appropriated for the benefit of stockholders without compensation. That is not permissible."); 11 U.S.C. §726 (absolute priority rule mandates distribution of assets in bankruptcy to creditors, including those with claims for "punitive damages," before any distribution to the debtor).

[34] The chairman of the Advisory Committee on Civil Rules, Fourth Circuit Judge Paul Niemeyer, recently warned that "[s]ome mass tort problems, such as how to resolve claims of those whose injuries have not yet manifested through a class device, simply cannot be resolved through the federal rules, and may never be amenable to an acceptable class solution." *Judicial Conference Approves Single Change to Federal Rule Governing Class Action Suits*, 66 U.S.L.W. 2182 (Sept. 30, 1997).



### C. Rule 23(b)(1)(B) May Not Be Used As A Substitute For Bankruptcy.

This settlement class action is "a self-evident evasion of the exclusive legal system established by Congress for debtors to seek relief." *Keene Corp. v. Fiorelli*, 14 F.3d 726, 732 (2d Cir. 1993). In *Keene* the court rejected an effort by an insolvent asbestos defendant to impose a mandatory class settlement upon future asbestos victims as a substitute for the safeguards of bankruptcy. Although the courts below grudgingly accepted the bare proposition that the Bankruptcy Code governs the distribution of the assets of a company beset by more creditor demands than it can satisfy (CA 76a), they nevertheless concluded that they could do a better job. CA 74a-80a; JA 92a, 102a. The court of appeals criticized the supposedly "weak and uncertain position afforded future tort claimants under the Bankruptcy Code" (CA 79a), and held that Congress's statutory scheme was "inferior[] to a 23(b)(1)(B) class action in the instant case." CA 74a. That dismissive judgment is contrary to the overwhelming consensus, voiced by the National Bankruptcy Review Commission, that bankruptcy "provides safeguards for the interests of mass future claimants that are unmatched in the class action system."[35] More important, as the Second Circuit stressed in *Keene*, the federal courts are not empowered to "conduct trials over whether a statutory scheme should be ignored because a more efficient mechanism can be fashioned by judges." 14 F.3d at 733.

Undeterred by these separation-of-powers principles, the court below declared that Congress actually *intended* that "the terms and principles of the Bankruptcy Code would be circumvented" whenever a federal court and settling parties concocted their own "superior methods of asset distribution." CA 78a (citing 11 U.S.C. §305(a)(1)). But Congress neither enacted nor contemplated any

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[35] 1 REPORT OF THE NAT'L BANKR.REV. COMM'N 340-41 (1997) *See id.* at 335-41 & nn. 836, 843 & 846 (comparing bankruptcy and mandatory class actions and citing 20 articles criticizing latter as inferior protection for absent class members); *Keene*, 14 F.3d at 732 ("class members in cases such as this would have no say in the conduct of the court-appointed class representatives and unlike creditors in bankruptcy, are not able to vote on a settlement. *See* 11 U.S.C. § 1126. For them, it would be 'cram-down' from start to finish.").

such delegation to Article III judges and private litigants of the quintessentially legislative power arrogated by the courts below. Section 305(a)(1) merely allows a federal court to suspend a bankruptcy proceeding "if an arrangement is being worked out by creditors and the debtor out of court," H.R.Rep. No. 595, 95th Cong., 1st Sess. 325 (1977), thereby enabling knowing, identified creditors to agree to an alternative resolution with an insolvent debtor. It is an *abstention* provision designed to promote voluntary private ordering by economic actors. It is *not* a grant of *authority* to the federal judiciary to ignore the Rules Enabling Act, and to circumvent the Bankruptcy Code, by using Rule 23 to enact its own solutions that prospectively alter the substantive state-law rights of unknowing, unidentified, unconsenting tort victims. That federal legislative power is reserved to Congress.

Indeed, in the Bankruptcy Reform Act of 1994 Congress enacted special legislative relief for insolvent defendants overwhelmed by present and future asbestos-related liabilities. *See* 11 U.S.C. §§524(g) & (h). These provisions enable asbestos defendants in Chapter 11 proceedings to set up a trust for asbestos claimants and to redirect all future asbestos personal injury claims from the defendant to the trust. An asbestos defendant must convey to that trust a majority of its voting shares, §524(g)(2)(B), whereupon the bankruptcy court may issue an injunction barring all asbestos claimants from filing suit against the debtor or its insurers. §524(g)(4)(A)(ii)(III). These amendments were enacted "to provide explicit legislative guidance to ensure equitable treatment of mass future asbestos claimants." 1 REPORT OF THE NAT'L BANKRUPTCY REVIEW COMM'N 320 (1997). The federal courts are not free to disregard that legislative command and to undertake policy-making experiments of their own. "If Congress intended to reach the issue before the district court, . . . that is the end of the matter"; "'[f]ederal courts are bound to apply the rules enacted by Congress with respect to matters . . . over which it has legislative power.'" *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988).[36]

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[36] The statute that enacted the asbestos amendments also established the National Bankruptcy Review Commission, whose first priority was addressing the problem of mass torts. 1 REP.NAT'L BANKR.REV.COMM'N at iv, 47. In 1997 the Commission submitted to Congress a host of detailed legislative proposals for handling mass future tort claims. *See id.* at 316-17, 322-34, 341-50.



Neither Respondents nor the courts below deny that Congress has provided special statutory relief for asbestos defendants, or that the courts below deliberately set out to craft a supposedly superior alternative to bankruptcy. Their only response is that bankruptcy was not an option in this case because Fibreboard was *unwilling* to go that route. CA 78a-79a; 376a. But this argument proves our point: Why should Fibreboard, or any other rational actor, *ever* swallow the tough medicine of Chapter 11 if it can convince a federal court to concoct, out of a procedural rule, an end-run around bankruptcy law that resolves its tort liability while leaving its equity intact?

## III. DUE PROCESS REQUIRES THAT CLASS MEMBERS HERE BE GIVEN THE OPPORTUNITY TO OPT OUT.

The Fifth Circuit's judgment binding absent class members violated due process in two ways. First, it purported to release individual monetary claims for particularized tort damages without granting the plaintiffs a meaningful chance to opt out.[37] Second, the court purported to exercise personal jurisdiction over many individuals lacking any contacts with the forum state of Texas.

In class actions seeking to bind plaintiffs with respect to "claims wholly or predominantly for money damages," "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 & n.3 (1985). "In [*Shutts*], this Court listed minimal procedural due process requirements a class action money judgment must meet if it is to bind absentees; those requirements include notice, an opportunity to be heard, a right to opt out, and adequate representation." *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 888 (1996)

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[37] The "back-end" exit provided in the settlement is mere "window dressing," not a meaningful opt-out right (CA 133a n.30 (dissenting opinion)), in large part because the settlement's multiple limits on recovery restrict even jury awards. *See Amicus Curiae* Brief of the American Trial Lawyers Ass'n.

(Ginsburg, J., concurring in part and dissenting in part); *see also* 3 NEWBERG ON CLASS ACTIONS §17.16, at 17-44-45 ("when unliquidated damages are involved, the exclusion right must be afforded as a constitutional matter.").

Rule 23 codified the constitutional right to opt out for class members with damages claims. The Advisory Committee explained that subdivision (b)(3) was drafted to accommodate the compelling due process interests of such class members:

> [T]he interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of class certification alt[illegible]ther. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. *Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request.*

39 F.R.D. at 104-05 (emphasis added). The opt-out right provided by Rule 23(b)(3) is an essential safeguard for the constitutional rights of absent class members claiming monetary damages. In *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (*per curiam*), this Court opined that there is "at least a substantial possibility" that "actions seeking monetary damages . . . can be certified only under Rule 23(b)(3), which permits opt-out."

Respondents contend that class members have no opt-out rights because they have a unitary interest in the insurance policies. Fibre. BIO 26-27; Ins. BIO 25-26. And the district court held *Shutts* inapplicable here because this class action "seek[s] equitable relief." CA 495a. As shown above, this wishful thinking is belied by the claims pleaded in the complaint, which are classic examples of personal injury claims for money damages. Indeed, the Fifth Circuit itself conceded that "the central remedial and legal theory of each of the named plaintiffs [is] that Fibreboard is liable in tort for damages." CA 58a.

As demonstrated above, pages 16-17, 33-34, it is nonsense to suggest that these claims were somehow transmuted into a single *in rem* claim for equitable apportionment of a common fund by being "bound together" in the settlement with the asbestos victims' interest in Fibreboard's insurance policies. Fibre. BIO 27. Rule 23(b)(1)(B)



does not vest federal courts with the power to perform such alchemy. Nor was there any need for the personal injury claims to be "bundled" with the insurance settlement at all. The Trilateral Agreement settled the insurance dispute without limiting asbestos victims' tort remedies. The "bundling" was merely the product of negotiating strategies, Fibreboard's "corporate goal" of resolving its asbestos liabilities through insurance alone, and the Insurers' desire for total peace.

In any event, because this case involves *exclusively* money damages claims, it presents an even more straightforward inquiry than did *Adams v. Robertson*, 117 S. Ct. 1028 (1997) (*per curiam*), and *Ticor Title*, which were suits involving claims for both monetary and equitable relief. *Adams*, 117 S. Ct. at 1029; *Ticor Title*, 511 U.S. at 120. This case involves solely the kind of individual claim that occupies the zenith of what this Court has unanimously described as "our deep-rooted historic tradition that everyone should have his own day in court." *Richards v. Jefferson County*, 116 S. Ct. 1761, 1766 (1996). Many of the class members here will suffer disabling injuries or will lose their lives as a result of Fibreboard's torts. "'Each plaintiff [in an action involving claims for personal injury and death] has a significant interest in individually controlling the prosecution of [his case]'; each 'ha[s] a substantial stake in making individual decisions on whether and when to settle.'" *Amchem*, 117 S. Ct. at 2246 (quoting Third Circuit).

The use of a mandatory class here also implicates the principles governing judicial exercise of personal jurisdiction. Under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), a federal court sitting in diversity must look to the law of the state in which it sits to determine whether personal jurisdiction exists. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 753 (1980); *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 221-24 (2d Cir. 1963) (Friendly, J.). In this case, a state court could not exercise personal jurisdiction over class members lacking minimum contacts with the forum state of Texas without affording them an opportunity to opt out. *See Shutts*, 472 U.S. at 812. By certifying this non-opt-out class and approving the settlement, the courts below impermissibly exercised jurisdiction over petitioners Allgood, Evers and Taylor (Alabama residents lacking any contacts with Texas), as well as over hundreds of thousands of other persons who have never been to Texas, do no

business there, and could not be haled into court there without their consent.

Although *Shutts* itself involved a state court, this principle of personal jurisdiction, which arises because of the *Erie* doctrine, is not limited to state courts. And "[t]he disadvantages of distant forum abuse are not mitigated by the forum's federal rather than state character." Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 31 (1986). Therefore, at the very least, the non-Texas class members could not be bound by this class judgment because they were denied the right to opt out.

## IV. NOTICE TO CURRENTLY UNINJURED "FUTURE CLAIMANTS" CANNOT MEET THE REQUIREMENTS OF RULE 23 AND DUE PROCESS.

In *Amchem* this Court explained that inherent impediments to adequate notice "rendered highly problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement." 117 S.Ct. at 2252. Although *Amchem* involved a Rule 23(b)(3) class, for which notice is mandated by Rule 23(c)(2), the Court relied in its notice analysis on the dissenting opinion of Judge Smith in this case, which involves a Rule 23(b)(1)(B) class, for which notice is mandated by Rule 23(e). 117 S.Ct. at 2252 (citing CA 113a-118a).[38] The Court observed that many class members "may not even know of their exposure [to asbestos], or realize the extent of the harm they may incur." *Id.* And, "[e]ven if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently," whether to accept or object to the settlement. *Id.* Although this Court did not "rule, definitively,

[38] Notice was vital (and compelled by both due process and Rule 23(c)(2)) in *Amchem* in order that class members be afforded a meaningful opportunity to evaluate the proposed settlement and exercise their rights under Rule 23(b)(3) to opt out of the class. Here, notice was equally vital (and compelled by both due process and Rule 23(e)) in order that class members be afforded a meaningful opportunity to evaluate the proposed settlement and decide whether to object to it. *See, e.g.*, 7B Charles A. Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 1797, at 365 n. 48, 372-73 (1986).



on the notice given" in *Amchem*, the Court nonetheless indicated its grave doubts "whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous." *Id.* The district court's findings about the size and expense of the notice campaign did not detain this Court in *Amchem*; the issue was (as it is here) whether meaningful notice to unidentified, unknowing, future tort victims is impossible *as a matter of law*.[39]

Respondents do not contest *Amchem*'s conclusion that adequate notice cannot be given to future claimants. They argue only that, since meaningless and ineffective notice is all that can be achieved here, only that sort of "notice" is required by the Constitution in a mandatory class action, citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Ins.BIO 27-28. But *Mullane* did not involve a class action. It involved a state judicial procedure for pooling small pre-existing trusts for administrative efficiency—a step that did not reduce any trust beneficiary's stake, 339 U.S. at 308-309—and individual notice was easily sent to most of the beneficiaries along with their regular trust fund checks. *Id.* at 318. Because of the "vital interest of the State in bringing any issues as to its fiduciaries to a final settlement" under a special state-legislated statutory scheme, *id.* at 313, the Court allowed, despite inherent notice problems, the release of potential claims against the trustee for improper management—claims that were derivative of the trust beneficiaries' *in rem* claims against the trust itself.

[39] Such doubts have led many authorities to conclude that "future claims will not and cannot be bound by the class action litigation. Toxic torts giving rise to latent illnesses and defective products with latent risks are two examples." 3 NEWBERG ON CLASS ACTIONS § 17.39 at 17-119. Acknowledging the due process limits on releases of future personal injury claims, *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985), concluded that it would be "absurd" to require a healthy future claimant who had been exposed to a toxin, "a person who had no inkling that years in the future he would be killed," to file a claim in a bankruptcy reorganization proceeding today. *Id.* at 943. Similarly, *In re Amatex Corp.*, 37 B.R. 613 (E.D.Pa. 1983), *rev'd on other grounds*, 755 F.2d 1034 (3d Cir. 1985), concluded that "[n]o genuine or meaningful notice can be given to individuals who cannot know of a future cause of action." *Id.* at 614.

Here there is no vital state interest sufficient to compel the release of hundreds of thousands of valuable, individual, and independent state-law personal injury claims held by a vast class of unknowing future asbestos victims. Indeed, this mandatory class action tramples the important state policies that protect tort victims through awards of full compensation, punitive damages, and interest. When such fundamental and quintessentially personal legal rights are at stake, if meaningful notice cannot be provided (as is undisputed here), due process requires that the class members be left to bring their claims as they arise, rather than be deprived of them now, without their knowledge or consent.

## V. THIS CLASS ACTION IS NOT A JUSTICIABLE CONTROVERSY UNDER ARTICLE III.

The decision below endorses the use of federal judicial power to enact a prospective change in the state-law rights of unconsenting, unknowing future asbestos tort victims who have no injuries and no ripe legal claims. It is hard to avoid Judge Smith's conclusion that "[t]his case shatters the constitutional limits placed on the authority of the federal courts by Article III." CA 155a. "When we depart from th[e] role" of resolving actual cases and controversies by accepting proposals for "private dispute resolution mechanisms, we quickly find ourselves acting more as legislative policymakers than as judges." CA 154a.

### A. This "Class Action" Is a Feigned Proceeding.

Fibreboard wanted to redirect and limit the entirety of its future asbestos tort liability to its remaining insurance policies, so it solicited several cooperative plaintiffs' lawyers to arrange a global settlement. *See* pages 2-3, *supra*; CA 41a. The district court judge choreographed the ensuing "proceeding." The Fifth Circuit noted that, while presiding over different lawsuits between Fibreboard and its Insurers over the terms of the policies (CA 40a, 42a), Judge Parker directed class counsel and Fibreboard to work together on—to "negotiate"—a new lawsuit, which the district court formulated as "a Rule 23(b)(1)(B) settlement class composed of future plaintiffs with claims against Fibreboard." CA 45a. Those negotiations involved not the resolution of *existing* legal claims for



*actual* injuries, but the establishment of an elaborate ADR process to take control of *future* asbestos claims against Fibreboard.

Of course, with respect to those plaintiffs who had been exposed to Fibreboard's asbestos but had not yet experienced injury (the vast majority of the class), Class Counsel could not predicate federal jurisdiction on claims for future lung cancers or other injuries that hadn't yet occurred, because such unripe claims would lack any present injury. So on behalf of the "exposure-only" future plaintiffs, Class Counsel could plead only claims for "fear of cancer," "enhanced risk of developing cancer," and "damages tied to the need to undergo medical monitoring to detect the early development of asbestos-related disease." CA 222a. Yet Class Counsel testified under oath that: (1) they believed that these exposure-only claims were not "compensable" causes of action; (2) they had never before in their lives filed such claims; and (3) they, like the other Respondents, never had any intention of actually litigating this class action. *See supra* pages 5-6. Fibreboard's counsel testified that Fibreboard had never settled or paid a judgment on such an exposure-only claim, nor did he know of any asbestos defendant that had. JA 95a-98a. And the Insurers apparently concede that class members "could not as of this moment recover money damages under state law," and proudly state that the class "brought this action *not* to recover damages now," but to set up a more efficient claims process for the future. Ins.BIO 30 (emphasis added).

Remarkably, the district court recognized that the pleadings were a *pretext*: "This action was filed to obtain judicial approval of a class settlement which . . . will resolve all *future* asbestos-related personal injury claims against Fibreboard." CA 183a (emphasis added). The Fifth Circuit likewise admitted that the parties "clearly did not intend to litigate the complaint." CA 86a. It therefore comes as no surprise that the settlement ADR process does not redress *any* of the claims pleaded in the complaint: there are no damages for "risk" of cancer, no subsidies for "medical monitoring" or psychotherapy for "fear" of cancer. CA 104a (Smith, J., dissenting). Therefore, the "*only* reason" to plead those claims in the complaint "was to manufacture jurisdiction over class members who have not yet manifested symptoms of asbestosis or otherwise suffered a legally cognizable injury." CA 104a-105a.

Respondents unanimously agree. Abandoning their own sham pleadings, the plaintiffs and defendant now say that Article III jurisdiction and standing are predicated on the class's "interest in the outcome of an existing [insurance] coverage dispute"—"an interest [that] was pleaded in the complaint (CA. 556a-59a)." Class BIO 28; Fibre BIO 28. But as explained *supra*, page 16, that "interest" was mentioned in the complaint solely as *background* material. It was not and could not have been *pleaded as a justiciable claim* here because—as Respondents admit, Class BIO 28—the insurance dispute was actually pleaded and litigated *not in this case*, but in the California state court case, and the fairness of the settlement of that dispute was then litigated as a declaratory judgment in *Rudd*.

Class Counsel ask this Court to pretend that this asbestos tort class action is really an insurance coverage case in disguise, insisting that they "could have properly litigated that interest" and "could have proceeded as a mandatory" class action on that issue. Class BIO 28, 29. Evidently it's all the same to the Respondents, since the pleadings and this lawsuit are a charade in any event. But the legal claims that founded jurisdiction in *Rudd* to adjudicate the rights of the class against the Insurers simply cannot provide jurisdiction here to resolve the personal injury tort claims that the class holds against Fibreboard.[40]

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[40] Class Counsel suggest that this Court can cure their failure to allege genuine, justiciable claims by "deem[ing] the pleadings amended to conform to the matters raised and the evidence adduced at the fairness hearings," pursuant to Fed.R.Civ.P. 15(b) and 28 U.S.C. § 1653. Class BIO 29. That is absurd. (1) Respondents' problem is not that, by some oversight, they carelessly pleaded a "defective allegation of jurisdiction," § 1653. The problem is that the pleadings were a sham and this is a feigned case. (2) The coverage dispute that they say they "could have" pleaded and then litigated at the fairness hearing was *not* in fact litigated at that hearing, so there is nothing to which the defective complaint can be "conformed." Indeed, the very purpose of that proceeding (and of the Global Settlement itself) was to *avoid* a judicial decision on the coverage issues. (3) Even if this Court were to pretend that the hypothetical claims involving the class interest *in favor* of insurance coverage for Fibreboard had been alleged and proven, those claims would not enable the class to seek approval of the Global Settlement, because that settlement extinguishes entirely *different* claims—namely, the class members' individual personal injury claims *against Fibreboard*. *See* note 10, *supra*.



This case fails the requirements of Article III. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Steel Company v. Citizens for a Better Environment*, 118 S.Ct. 1003, 1019 (1998). The filing of the complaint was orchestrated by the settling parties solely as part of their joint effort to foist their negotiated tort reform proposal upon the class. Article III jurisdiction may not rest upon such a "contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist." *City of Dawson v. Columbia Ave. Saving Fund*, 197 U.S. 178, 181 (1905).

Respondents contend that the justiciability of collusive settlements was resolved long ago by cases like *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928), Ins.BIO 28-29 & n.*; Fibre BIO 28. But each of those consent-decree cases involved an actual contemplated lawsuit and an imminent litigable dispute that would have transpired if the consent decree were not issued, whereas here it is undisputed that the class never had any intention of litigating the class complaint, which was filed solely to provide the district court with a jurisdictional hook.[41]

Worse still, the district court itself participated in this charade. Just last Term, in *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055 (1997), this Court unanimously rebuked the Ninth Circuit for offering "suggestions" and "instructions" to friendly parties on how to "place" an issue before a federal court in a way that superficially appeared to be a justiciable controversy. 117 S.Ct. at 1065 & n.15. The Respondents here likewise "took the steps the [federal court] prescribed" in order to sustain the pretense of a justiciable controversy. 117 S.Ct. at 1070. *See* page 3, *supra*. And the constitutional vice was the same: "In advancing cooperation between" the parties on the framing of the proceeding for submission

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[41] If the defendants in those cases had not consented to judicial approval of the decrees, the parties would have gone back to litigating, because those cases involved continuing conflict over *future* misconduct by the defendants that had to be addressed by an injunction. *See Swift*, 276 U.S. at 326; *SEC v. Randolph*, 736 F.2d 525, 527-28 (9th Cir. 1984). The consent-decree cases are also distinguishable because they were all cases brought by government agencies that, while settling the government's claims, preserved rather than extinguished the rights to sue of individuals injured by the defendant. *E.g., Rodgers v. U.S. Steel Corp.*, 536 F.2d 1001, 1003 (3d Cir. 1976).

to a federal court, the courts below "did not home in on the federal courts' lack of authority to act in friendly or feigned proceedings." 117 S.Ct. at 1070 (citing *United States v. Johnson,* 319 U.S. 302, 304 (1943)).

If anything, the abuse in this case is greater than that condemned by this Court in *Arizonans*. Here it was not just a question of rigging the appeal posture to resurrect the justiciability of a once-live legal dispute. In this case, there was no justiciable controversy *at any time*. This "case" is a legislative joint venture, not an adversarial lawsuit.

### B. The "Exposure-only" Class Members Have No Injury in Fact.

To establish standing under Article III, a litigant must demonstrate that he has suffered an "injury in fact": "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Here virtually the entire plaintiff class consists of people who have been exposed to asbestos but who have no actual injuries. They allege no disease, no physical impairment, just "risk" or "fear" of *future* injuries. CA 222a. Such "[a]llegations of possible future injury do not satisfy the requirements of Article III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). *Id.* As the dissent explained in great detail below (CA 154a-180a), the vast majority of the exposure-only class members in this diversity suit cannot show "an invasion of a *legally protected interest,*" *Lujan*, 504 U.S. at 560 (emphasis added), sufficient to confer standing, because the substantive tort law of most states affords no cause of action for mere exposure to a toxin. CA 174a & n. 75. *Amchem*, 117 S.Ct. at 2244 n.15; *Metro-North Commuter R.Co. v. Buckley*, 117 S.Ct. 2113, 2118 (1997) ("with only a few exceptions, common law courts have denied recovery to those [exposed to asbestos or other toxins] who . . . are disease and symptom free")(collecting cases).[42]

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[42] Although the district court's holdings on subject matter jurisdiction and "good faith" pleading of these exposure-only claims were predicated on the supposed availability of recovery for such actions in California, where Fibreboard resides (CA 222a), Class Counsel conceded that there is no "recoverable" cause of action in California for risk or fear of cancer without actual physical injury. *See supra* page 6.



This Court has unanimously held that the question of whether the plaintiff has a "legally protected interest," and hence standing, is "'a question of substantive law, answerable by reference to'" the rule of law "'whose protection is invoked.'" *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). Therefore, "when a state has declined to give life to a cause of action at all, federal courts sitting in diversity also must refuse to entertain that cause of action." CA 178a (Smith, J., dissenting).[43]

A federal court has no jurisdiction if the plaintiff's "claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.'" *Steel Co. v. Citizens*, 118 S.Ct. at 1010. The "Article III requirement of remediable injury in fact" is not fulfilled where the plaintiff pleads only "entirely frivolous claims." *Id.* at 1013 n.2. Therefore, in the case at hand, "[a]ny claims not authorized by state law should have been explicitly excised" from the class complaint because the district court lacked jurisdiction over them under Article III. CA 180a (Smith, J., dissenting).

Strict enforcement of the "actual injury" requirement is essential because it is "a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey*, 116 S.Ct. 2174, 2179 (1996). The courts below forsook this principle, venturing instead into the legislative domain. And Article III standing requirements have a federalism dimension as well: they are "'a part of the basic charter . . . providing for the interaction between the [federal] government and the governments of the several states.'" *Spencer v. Kemna*, 118 S.Ct. 978, 985 (1998) (ellipsis and brackets in original). The Fifth Circuit's legislative adventures thus invade the prerogatives of both Congress and the States.

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[43] The question is not whether the plaintiff will win on the merits, but whether it is even arguable that such a cause of action even *exists* under the substantive law of the governing jurisdiction, and thus whether the plaintiff's allegations of injury, in the context of that cause of action, satisfy Article III.

## CONCLUSION

The judgment below should be reversed and the case remanded with instructions to decertify the class and to dismiss the action for lack of a justiciable controversy.

Respectfully submitted,

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